No. 15-797

JUL 28 2016

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Court of Criminal Appeals Relevant Docket Entries	1
Affidavit of Robert P. Borda, dated Dec. 16, 2013	6
Testimony of Robert P. Borda, dated Jan. 2, 2014	18
Direct examination: 133:10 – 158:4	18
Cross examination: 158:9 – 170:23	39
Redirect examination: 171:3 – 175:3	50
Recross examination: 175:10 – 178:24	54
Further redirect examination: 179:4 – 179:15	57
Expert Report of Shawanda Williams-Anderson, dated Dec. 20, 2013	58
Testimony of Shawanda Anderson, dated Jan. 3, 2014	75
Direct examination: 48:25 – 65:18	75
Cross examination: 65:23 – 66:2; 68:9 – 69:11; 70:15 – 71:7; 74:4 – 74:11	90
Redirect examination: 76:23 – 79:8	93
Further redirect examination: 81:8 – 82:10	95
Curriculum Vitae of Shawanda W. Anderson	97
Testimony of Stephen Greenspan, dated Jan. 2, 2014	113

TABLE OF CONTENTS—Continued

Page

Direct examination: 181:19 – 182:16; 186:20 – 187:6; 187:25 – 188:13; 188:20 – 189:17; 190:4 – 190:11; 194:17 – 195:24; 200:10 – 201:5; 211:8 – 212:2 113

Cross examination: 212:17 – 223:1..... 119

Testimony of Stephen Greenspan, dated Jan. 3, 2014..... 128

Cross examination: 4:22 – 8:16 128

Redirect examination: 40:3 – 40:18..... 132

Testimony of Kristi Compton, dated Jan. 3, 2014 133

Direct examination: 83:18 – 144:1..... 133

Cross examination: 144:19 – 179:5..... 185

Redirect examination: 179:10 – 183:11..... 215

Recross examination: 184:5 – 187:18 219

Further redirect examination: 187:25 – 188:14 222

Curriculum Vitae of Kristi L. Compton..... 224

Affidavit of Gina T. Vitale, dated June 16, 2003 229

Affidavit of Richard Garnett, dated June 16, 2003 248

Testimony of Bettina Wright, dated Feb. 12, 2001 256

Direct examination: 6:11 – 21:14; 25:1 – 26:6 256

Redirect examination: 42:20 – 43:2..... 269

COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-13,374-05

BOBBY JAMES MOORE,

v.

TEXAS,

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
02/24/2014	Article 11.071 Writ Received
02/24/2014	Reporter's Record Received
06/04/2014	Order Filed
07/14/2014	Supplemental Clerk's Record Filed
10/02/2014	Supplemental Clerk's Record Filed
01/28/2015	Case Set for Submission
01/28/2015	Designation for Non Argument Cases
02/11/2015	Case Submitted
09/16/2015	Opinion Issued
10/12/2015	Mandate Issued

185th JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 314483-C

BOBBY JAMES MOORE,

v.

TEXAS,

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
06/17/2003	Application for Writ of Habeas Corpus
12/23/2003	Respondent's Original Answer
01/27/2004	Respondent's Supplemental Answer
06/23/2005	Habeas Counsel's Letter Regarding Applicant's Withdrawal of His Prior Request to Discontinue Habeas Application and Appeals
10/03/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeal
10/07/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeals
10/07/2005	Applicant's Pro Se Ex Parte Motion to Waive Further Appeals
02/13/2008	Respondent's Motion Requesting Court to Order Trial and Appellate Counsel to File Affidavit

DATE FILED	DOCKET TEXT
02/13/2008	Order
02/13/2008	Respondent's Motion Requesting Court to Order Trial Counsel to File Affidavit
02/13/2008	Order
03/07/2008	Amended Order
04/30/2008	Affidavit of Robert Morrow
01/22/2009	Stephen Morris Motion to Withdraw as Defense Counsel
02/03/2009	Order
03/19/2009	Order Appointing Patrick McCann as Habeas Counsel
02/28/2011	District Attorney Pro Tem's Motion for Appointment of Investigator
11/16/2011	Article 11.071 Factual Supplement to Writ
03/19/2013	District Attorney Pro Tem's Motion for Appointment of Mental Health Professional
03/19/2013	Order
11/14/2013	Ex Parte Motion for Funding of a Neuro-Psychological Expert
11/14/2013	Order
11/20/2013	Ex Parte Motion for Funding of a Neuro-Psychological Expert
11/20/2013	Order
11/20/2013	Ex Parte Motion for Funding of an Intellectual Disability Expert

DATE FILED	DOCKET TEXT
11/20/2013	Order
11/20/2013	Ex Parte Motion for Funding of a Psychological Expert
11/20/2013	Order
11/20/2013	Credentials of Shawanda W. Anderson, Ph.D., HSPP
12/19/2013	Affidavit of Robert P. Borda Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Dr. Shawanda Williams-Anderson Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Mark Fronckiewicz Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Lonnie Moore Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Larry Baker Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Clara Jean Baker Regarding Bobby Moore's Intellectual Disability and Mental Retardation
12/20/2013	Affidavit of Parneva Williams Regarding Bobby Moore's Intellectual Disability and Mental Retardation
01/02/2014-01/03/2014	Hearing Regarding Application for Writ of Habeas Corpus

DATE FILED	DOCKET TEXT
01/21/2014	Applicant's Proposed Atkins Findings
01/23/2014	Respondent's Proposed Findings of Fact and Order
02/06/2014	Court's Findings of Fact and Conclusions of Law

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AFFIDAVIT IN THE CASE OF BOBBY JAMES MOORE

I am licensed by the State of Texas as a Psychologist, and have been practicing Clinical/Neuro Psychology for over twenty-five years. In my practice, I evaluate the cognitive abilities of a wide range of individuals, from younger ones who are suspected of having learning disabilities or attentional deficits to older ones who are suspected of having suffered traumatic brain injury or who might have a form of dementia. In my practice, I commonly administer a variety of formal measures of intellectual abilities, including standardized tests such as the Wechsler scales. My training and experience make me well qualified to interpret the findings from intelligence tests, and to make a diagnosis of mental retardation when it is appropriate.

My academic background includes a Bachelor's Degree from Princeton University (where I majored in Psychology), a Doctoral degree from Baylor College of Medicine (majoring in Neurophysiology), and a Doctoral Degree from The University of Houston (in

the Clinical/Neuro Psychology program). In addition to my private practice in clinical neuropsychology, I also serve as an expert witness for the Social Security Administration (SSA) in disability claims which have been appealed. I testify as a medical expert in the area of mental disorders, and frequently will be asked to determine if a claimant meets the SSA's criteria for mental retardation. I am a member of the American Psychological Association and the National Academy of Neuropsychology, was one of the founding members of the Houston Neuropsychological Society (where I was a member of the Board of Directors for 16 years), am a Diplomate of the American Board of Professional Disability Consultants, and listed on the National Registry of Health Services Providers in Psychology. In addition to outpatient private practice, I also have worked in rehabilitation facilities where patients with brain injuries were being treated.

Although forensic psychology is not my specialty, in 1993 I was asked to provide testimony regarding Mr. Moore's intellectual abilities. I did not personally evaluate Mr. Moore, but instead reviewed records which were supplied to me; from this review, which included some formal IQ testing, I concluded that Mr. Moore likely was functioning in the Borderline Range of intellectual functioning, corresponding to an IQ of 70-79. I recently have been given the opportunity to review extensive additional records; if these had been available to me in 1993 I would have reached a different conclusion. Several factors would influence my conclusions at the present time. One is that the "Flynn Effect" was not yet widely accepted, as Flynn only published a paper on the effect of out-of-date test norms in 1984. This effect is now well accepted in the

field of psychology, and documents that the population performs better on IQ tests over time, so that norms established ten years prior to the actual testing date could overstate an individual's actual IQ by as much as three "points". This finding recently was corroborated by psychologists at the University of Houston (Fletcher, Stuebing and Hughes, J. Psychoeducational Assessment, 2010). In fact, more recent studies at the University of Houston (manuscript submitted for publication by L. Hughes, J. Fletcher, K. Steubing, and M. Hiscock) suggest that at the extremes of the IQ range (i.e., IQs lower than 80 or higher than 120) the "Flynn effect" is even more pronounced, as much as five or ten "points" of inflation for each decade of test score obsolescence. Other factors that would influence my opinion now are fairly extensive additional test findings and testimony from family members which have been made available to me, these spanning a much larger time frame than I was able to review before. Also, the definition of "mental retardation", or intellectual disability (ID), has changed to some extent, and differs according to whether that of the various editions of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual (DSM), the definition of The American Association on Intellectual and Developmental Disabilities (AAIDD), or the requirements listed by SSA for disability are being referenced.

In an attempt to establish standards for the definition of what then was called "mental retardation", the early editions of the DSM began to urge guidelines based upon performance on standardized tests of intelligence, such as the Wechsler Scales. The APA's DSM-

IV (1994) lists three requirements to meet the definition of Mental Retardation: 1) Age of onset before 18 years, 2) Significantly sub-average intelligence with IQ approximately 70 or below on an individually administered IQ test, and 3) Concurrent deficits or impairments in present adaptive functioning in at least two of the following areas (communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety). The recent edition of the manual (DSM-5, May, 2013) introduces the notion of ID being a neurodevelopmental disorder, one of a family of organic mental disorders arising in childhood and marked by limitations in cognitive development. This new version of the DSM also states that intellectual functioning can be assessed more reliably by comprehensive neuropsychological measures of frontal lobe-based "executive functions" (e.g., planning, reasoning, monitoring of performance, and inhibition of inappropriate responses), measures which are not well assessed by IQ testing. By DSM-V, ID is not determined solely by reference to a rigid "bright line" criteria of IQ, but more by assessment of adaptive functioning (such as gullibility and risk awareness), a definition which much more closely resembles that used by the AAIDD, and recognizes that "Full Scale IQ is an imprecise window into the quality of (an individual's) cognitive functioning" (DSM-V, p. 37).

For the purposes of meeting Federal disability criteria, the SSA requires "significantly sub-average general intellectual functioning with deficits in adaptive functioning initially manifested during the devel-

opmental period: i.e., before age 22." Listing requirements can be met in three ways: 1) the applicant could have a valid verbal, performance or full scale IQ of 59 or less, 2) the applicant could have a valid verbal, performance or full scale IQ of 60-70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function, or 3) the applicant could have a valid verbal, performance or full scale IQ of 60-70 resulting in at least two of the following: Marked restriction of activities of daily living, or Marked difficulties in maintaining social functioning, or Marked difficulties in maintaining concentration, persistence or pace, or Repeated episodes of decompensation, each of extended duration.

Versions I-IV of DSM and the SSA definitions rely heavily on formal test scores on an instrument such as a Wechsler Scale, but obviously also consider functional abilities which impact an individual's ability to live independently. The AAIDD's definition of Intellectual Disability is more broadly based, yet quite similar. That definition of mental retardation requires "significant limitations in intellectual functioning, significant limitations in adaptive behavior, and age of onset before age 18". The operational definitions are as follows: "Intellectual functioning"—an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations. This would equate to an IQ score which falls below the 3rd percentile (73 or below). "Adaptive behavior"—performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without intellectual disability that is

approximately two standard deviations below the mean in either conceptual, social or practical skills. The AAIDD stresses that the definition should not specify a hard and fast cutoff point/score for meeting the requirements of intellectual impairment, but rather needs to factor in such variables as practice effects (which can artificially raise scores by as much as 2/3 of a standard deviation or more), fatigue effects, and the age of the norms used (referring to the Flynn Effect), as well the concept of statistical error.

From the records which I reviewed recently, it appears that Mr. Moore would satisfy all of these definitions of Intellectual Disability, including those of the APA, the AAIDD, and the SSA. He clearly had marked deficits in adaptive functioning. Examples of this include his being raised in a physically- and emotionally-abusive family environment, yet never seeking any outside intervention, when he would be "kicked out of the house", he would sleep on neighborhood porches or in cars rather than asking a neighbor or relative for assistance. When he finally did move out of his parent's home permanently, he "lived on the streets" for most of his teenage years; he sometimes was permitted to sleep in a back room of a pool hall in exchange for performing simple chores, His family was very poor and he often went without eating; Mr. Moore likely had severe nutritional deficits when he was a child, as well as numerous head injuries (from his father, from being beaten by others his age, and by jumping from a moving train), and both likely contributed to his intellectual deficiencies. By testimony from family members, Mr. Moore would eat from garbage cans when he was famished, even though he had contracted food poisoning in the past from this

behavior; this shows that he was not able to learn from past experiences. He also had communication deficits, with speech impediment and difficulty grasping what others said. He was a very poor student, failed the first grade twice, and apparently only received "social promotions" in school after that point. He also was noted in school records to exhibit attentional deficits. After years of academic failure, Mr. Moore's school recommended when he was 13 years of age that his teachers conduct daily drills on such basic things as days of the week, months of the year, seasons, standards of measure, and telling time. This suggests that his intellectual limitations were profound. He was reported by family members to "always be a follower", and relied on others to make decisions for him. He was described by teachers as being "very withdrawn", so it is obvious that he had very limited social skills as well as deficits in adaptive functioning.

With respect to the AAIDD's requirement of documented deficiencies in intellectual functioning, I reviewed testing which was performed at various times in Mr. Moore's adolescence. The first instrument which was used (1971) was the Otis-Lennon Mental Abilities Test. This test is used primarily to assess academic needs, and is not accepted as an instrument appropriate for the assessment of mental retardation or intellectual deficiency. A year later, Mr. Moore was administered the Slosson Intelligence Test for Children (SIT). At that time, the norms for the SIT would have been over ten years out of date, yet Mr. Moore's score (uncorrected for the Flynn Effect) still equated to an IQ of only 57. Using the appropriate correction factor, this would place his score closer to 50, clearly well within the range of Mental Retarda-

tion by the criteria of any organization or agency. A year later, Mr. Moore was administered the Wechsler Intelligence Scale for Children (WISC); his score on this equated to an IQ of 78, but the norms were 25 years out of date (!) and Flynn-adjustment would lower his score to 65 or below. A higher score on similar tests administered sequentially is common, and relates to what is termed regression towards the mean. If the same test is administered sequentially it is expected, based on statistics alone, to yield progressively higher scores. Even so, when Mr. Moore was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) in 1989, he earned an IQ score of 74. At that time, the norms for this test were ten years out of date, so with Flynn Effect correction the score would be no higher than 71.

Mr. Moore also was administered several other tests over the years which were not, strictly speaking, "IQ" tests, but nonetheless can give a rough approximation of an individual's intellectual and social development. One of these was the Goodenough "Draw-a-Person" Test, which was given in 1973, and placed him at the upper limit of the Mentally Retarded Range. The Bender Visual Motor Gestalt Test, widely used even today as a screening test for organic mental disorders, was administered that same year and placed him well below the first percentile in visuo-motor development (well within the Retarded Range).

When all of these test scores are considered in light of the latest findings at the University of Houston, Mr. Moore's intelligence would be even lower. Even using their more conservative estimate of five IQ "points" of score inflation for every decade of norms obsolescence, the prior testing results would be adjusted as follows:

"Score" refers to the IQ based upon the published test norms, "FCS" refers to the score adjusted for the Flynn effect, and "UHS" refers to the tested IQ corrected using the latest estimates from the University of Houston's research. The dates given are for when the test was administered, and when the norms were determined (typically two years prior to test publication).

Administered/ Norms	Test Instrument	Score	FCS	UHS
1972 / 1962	Slosson	57	54	52
1973 / 1947	WISC	78	70	65
1973 / 1936	Bender VMGT	67	56	48
1973 / 1961	Goodenough	71	67	65
1989 / 1979	WAIS-R	74	71	69

Also to be considered in evaluating these score would be the Standard Error of Estimate (SEM), the statistical measure of how accurate a test score can be considered to be. For most IQ tests, the SEM is +/- five points. Clearly, by all of these measures Mr. Moore's IQ can be considered to fall below 70.

Recently I had the opportunity to review a statement by Gina T. Vitale, LMSW, CCFC, which summarizes the findings relative to Mr. Moore's intellectual deficiencies. She concluded that, based upon formal assessment, social history, and interview of family members, Mr. Moore should be considered to be mentally retarded, a conclusion which agrees with mine. I also reviewed the opinions of Richard Garnett, Ph.D. concerning Mr. Moore's intellectual limitations, and

his opinions also agree with mine. Dr. Shawanda Williams-Anderson, a neuropsychologist, examined Mr. Moore during November and December of 2013. She concluded that Mr. Moore's abilities innately have been better in nonverbal areas than in verbal, but that he demonstrated behavioral and intellectual deficits consistent with traumatic brain injury, likely with involvement of the frontal regions.

I was given the opportunity to examine Mr. Moore personally on December 12, 2013, at the Harris County Jail. I was provided with a private room (guards were stationed immediately outside of the door), and for the evaluation Mr. Moore's hand shackles were removed; ankle shackles remained in place. At the time of the evaluation, Mr. Moore was 54 years of age. He presented as a fairly tall black male with a well-trimmed beard, who was quiet and passive but pleasant and cooperative. Eye contact was marginal, but he appeared to give a good effort on all tasks. A very limited test battery was administered since he had been evaluated so many times in the past, and even recently. He was found to be oriented to person, place and time, and knew the purpose of the examination. He could read aloud and execute very simple commands (e.g., "Place your left hand on top of your right hand"). He was given three words to remember ("apple, penny, blue") and told that he later would be asked to recall them. Immediate recall was 3/3, but delayed recall only 1/3. He was asked to write a simple sentence describing the examiner; he printed, "You are short" (this is accurate, but not very tactful).

One formal measure of IQ was administered, the Raven's Colored Progressive Matrices (RCPM). This is a nonverbal measure of reasoning, similar to the

"Matrices" subtest of the newer Wechsler scales, and has been widely used in the assessment of individuals who either cannot perform the Wechsler-type tests because of linguistic or physical limitations, or who are suspected of having marginal intellectual abilities. On the RCPM he earned a score of 21 (out of 36); the norms for the RCPM were established in 1975 - 1976 and his score would equate to an IQ of 85. With Flynn correction, his current score would equate to an IQ of 74, but with the U/H correction would be closer to 66.

I also administered the Trail Making tests, and Mr. Moore performed somewhat better than he did in Dr. Williams-Anderson's evaluation a few weeks prior, suggesting that practice effects were present. His completion times fell within the Borderline-Low Average Range. He also was administered the Timed Sustained Attention Test (TSAT), a measure of mental tracking and flexibility. Even without any correction factors (norms were established in 1989), his performance fell within the Retarded Range (below the first percentile).

One other test was administered to Mr. Moore, the Tinker Toy Test (TTT). Although not a test of IQ *per se,* the TTT is used widely in head trauma rehabilitation centers as one measure of "executive functioning". Mr. Moore never had seen this test before (indeed, had no idea what Tinker Toys were), so no practice effects were present. Scores on this test have a range of 13 to less than one, with scores of seven and above being favorable indicators for employment. According to the authors of the test (Bayless, Varney & Roberts, J. Clin. Experimental Neuropsychology, 1989), scores below seven generally correlate with independent observations of impaired empathy, judgment, initiation, or "absent-mindedness". Mr. Moore's

score on the TTT was only one, and would be compatible with frontal lobe-based deficits in executive functioning.

Reviewing all of the test data available for Mr. Moore, I now would conclude that at the time he was charged with a crime Mr. Moore was functioning at no higher than the first or second percentile of intellectual functioning. This would satisfy the most common criteria for documented deficiency in intellectual abilities, and severe deficits in adaptive functioning have been outlined above. Based on this, it is my opinion that Mr. Moore should be considered as having a significant Intellectual and Developmental Deficiency, and by any current standards should be considered to have functioned within the Mentally Deficient (or Mentally Retarded) range for all of his teen and adult life. This would be the case regardless of whether a "bright line" standard, or an adaptive functioning measure, is utilized.

/s/ Robert P. Borda
Robert P. Borda, Ph.D.
Clinical Neuropsychologist

SWORN TO AND SUBSCRIBED BEFORE ME, by Robert P. Borda, Ph.D., on the, 16 day of December, 2013, to certify which witness my hand and seal of office.

My commission expires 10/13/17

/s/ Lauralee O'Brien
Notary in and for the State of Texas

REPORTER'S RECORD
VOLUME 2 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

V.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 2nd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[133] Q. (BY MR. MCCANN) Dr. Borda, what do you do for a living?

A. I'm a clinical neuropsychologist in private practice.

Q. Let's go through your education and training and background quickly for the record, if we could. Where did you attend undergraduate studies?

A. Where? Princeton.

Q. And where'd you go for graduate studies?

A. Well, I started at the University of Houston in psychology and then because my advisor left and I was working on a research project at Baylor Med, I ended up switching to Baylor Med and got master's and doctor's degrees in physiology from Baylor Med, was on the faculty there for 11 or 12 years and then went back to graduate school at U of H and got a second doctorate in [134] neuropsychology.

Q. And how do you use those degrees now?

A. I'm in private practice. My physiology training was really in neurophysiology, so that's always had to do with brain function, and I see a lot of people in my practice now that have neurological disorders. So part of my practice, maybe not quite half, is devoted to clinical assessment of people that have some sort of brain dysfunction either from head injury, dementia, toxic exposure, things like that. The other part of my practice is testifying as an expert witness in disability hearings for social security.

Q. Just let me explore that briefly. You're saying you testified as an expert on people who are applying for benefits for intellectual disability?

A. Well, they're applying for federal disability and if their problems involve mental disorders, then I might get called in to help the Judge make a decision.

Q. Do you have any honors or board certifications in your field?

A. I'm board certified by the American Board of Professional Disability Consultants, members of, you know, various professional societies. I'm one of the founding members of the Houston Neuropsychological Society. I was a member of the board of directors and was treasurer of the [135] organization for 16 years, I believe, a long time. So, that's it.

Q. Okay. Have you published any articles in your field?

A. Well, not since I've been in private practice.

That's kind of incompatible. I've published a lot of papers in neurophysiology when I was at Baylor but not since. Maybe one.

Q. Okay. And during this time have you had an opportunity many years ago to consult on this very case back in probably the '90s?

A. 1993, I had to go back and look at my records. It was a long time ago. I had only been in private practice about eight years, I think, at that point, yes.

Q. Okay. And did you review records and provide testimony at a different hearing in '93 in federal court regarding what we would call a Penry claim of intellectual disability for mitigation?

A. Yes.

Q. You did?

A. I did.

Q. And did my office and specifically a young associate of mine, Luke Farley, approach you, gosh, a year or more ago regarding reviewing your work and coming back to consult on this case again?

[136] A. Yes, sir.

Q. And since then have you reviewed a number of medical records and affidavits and other items that we had provided to you over the course of the last year?

A. Yes.

Q. Have you also had a chance to examine in person Mr. Moore at the facility he was being held at?

A. Yes, sir.

Q. And when did you conduct that examination?

A. Mid-December.

Q. Okay. And we asked you to consult regarding what is now referred to often as intellectual disability but in our old-fashioned parlance is called making a determination of mental retardation; is that fair?

A. Yes, sir.

Q. Okay. Tell us about what mental retardation is in the field of psychology and disability.

A. Well, like so many things, I think, you know, the definition depends on what area you're coming from and when you're doing it. It's changed over the years. But it generally refers to well-below-average abilities to take care of personal needs, think things through, reason effectively, generally function. You know, sometimes it's just defined by a raw number on a test score; other times it's defined by what's called adaptive functioning, ability [137] to kind of get along and doing activities of daily living, live independently.

Q. Let's talk about that. You said a raw score on a test. Do you mean an intelligence quotient test, an IQ test?

A. Yes.

Q. What is IQ?

A. The best definition of IQ is IQ is what is measured by IQ tests.

Q. Okay.

A. There really is no good definition of it because it involves so many things. One of the oldest definitions is mental age over chronological age times 100, mental age being what someone is capable of doing and then relating that to what would be typical for someone of that age. So if someone is capable of doing things at about an 8-year-old level but they're 16, then their IQ would be roughly 50. So, it depends on what—you know, they're always related to people of the same age and what they should be capable of doing.

Q. So, IQ tests, tests that measure this version of intelligence, in other words, someone's intellectual function, have to be sort of given to a wide variety of ages to be what we would call normalized or normed out. Is that fair?

[138] A. Typically that would be the case, yes.

Q. Okay.

A. You know, the decade norms, you get norms for people from, you know, 16 to 20 and then another group, 20 to 24, something like that, but yes.

Q. Okay. And tell us about some of the tests that people use to measure this intelligence quotient.

A. Well, there are, you know, literally dozens. More than that, probably. Probably the best known historically would be the Stanford-Binet, been around a long time but then the Wechsler Scales came to be very popular and I started—David Wechsler was a psychologist that came up with intelligence tests and his tests were unique, I think, at that time because they involved measuring many different abilities, not

just, you know, vocabulary or something like that but they would have typically 11 or so different tests of—going to making up the composite score and the Wechsler Scales are still widely used.

The disadvantage of the Wechsler score is that they have always been oriented towards academic abilities and even today, you know, they don't give necessarily a good feel for what somebody is capable of doing in the real world. An exception to that might be a rocket scientist. I mean that literally. Someone with a high IQ would do better as a rocket scientist than someone with a low IQ. But other [139] than that, there's really not very much predictive value to it. I mean, you know lots of people in the Houston community that are very successful business men who probably don't have very high IQ but they—

Q. They might have average?

A. Yeah, they work hard and they're, you know, at least average or so and they do okay.

Q. But let's be clear. Even if there are flaws in whatever test method one uses, there are norms of intelligence, let's say an average, a point along a curve, if you would. People on the far side, or the high side might be better suited for some jobs but people on the low side of that with lower scores are going to have significant struggles in life, aren't they?

A. Yes.

Q. Okay. Let's talk about some of the typical testing scores and the meanings that one would see. For instance, let's take the opposite. What is the typical definition of a genius level IQ?

A. Probably 99 percentile and above; so, 140 IQ or higher.

Q. Okay. And what would be an average IQ score of any random person you saw on the street?

A. Well, average in IQ testing is statistically defined as 25th to 75th percentile. So, half of the [140] population falls in the average range. It equates to IQs of 90 to 110.

Q. Okay. So, an IQ of 105 would fall in the average range?

A. Yes.

Q. An IQ of 97 would fall in the average range?

A. Right.

Q. What is—and we should talk about this, too. Is there such a thing as an American Association for the Intellectual Disability and Development Disorders?

A. Yes.

Q. And does this group publish a handbook?

A. Yes.

Q. Does this group try to educate the large populace about the needs of what is now called intellectual disability, what used to be called mental retardation?

A. Yes.

Q. Okay. And what, if you know, what are their criteria for a diagnosis of mental retardation?

A. Well, they're emphasizing the need for more kind of practical measures of cognitive ability rather than relying so much on test scores but, you know, test scores are important but I think adaptive functioning is probably more important in their parlance.

Q. Okay. Tell us what adaptive functioning is.

[141] A. Ability to just do everyday things on your own and do them successfully.

Q. Such as balance a checkbook?

A. Balance checkbooks, but mostly, I think, plan ahead and decide, you know what your needs for food might be that week, how you're going to get them, you know. Financial management, of course, would be a big part of that. But just everyday things where you have to actually make a decision as to what you're going to do, implement that decision, see whether or not you're getting closer to the correct solution or not and if not, then modify your behavior. That's kind of what's involved in frontal lobe functioning.

Q. Okay.

A. It's called the executive functioning.

Q. And if I understood you correctly, the American Association for Intellectual Disability and Development Disorders believes that that should be a more practical emphasis than straight IQ tests; is that fair?

A. Yeah, they're emphasizing what as a neuropsychologist, to me, makes more sense, which is really neuropsychological functioning rather than just, you know, rote memory and simple things.

Q. For qualifying for federal disability benefits, just briefly, are those criteria similar for intellectual [142] disability?

A. They are. They have not changed in the 20 years I've been doing this and they still—they still rely pretty heavily on test scores but the basic requirement is that the person claiming disability demonstrate what would be a life-long history of well below average ability to live independently. And then once you've satisfied that requirement, then there are various

other ways of meeting the criteria. One would be to have a valid IQ with a standardized test such as the Wechsler Scale or the Stanford-Binet or Raven Matrices that equates to an IQ below 60 and if you got that, slam dunk, I mean, that's all you need to do. If it's in the range of 60 to 70, then if you have an additional limitation that would affect your ability to hold a job, such as attentional deficit or extreme academic skills disorder, inability to get along with people, all those things enter into whether or not you meet their standard for having another limitation. It could also be a physical limitation, you know, only one arm or something like that.

Q. That's not what we're talking about here?

A. No.

Q. Tell us what the Diagnostic and Statistical Manual-IV and new edition V are, please.

A. Well, those were published by the American [143] Psychiatric Association and they are—you know, initially they were meant to be an aid in helping clinicians talk about things in the same way. So they're supposed to be—if some—if one person was talking about a borderline personality, then there should be some sort of standard for that so if somebody else talks about that personality style, then we're talking about the same thing. So, that's why it was called a diagnostic and a statistical manual. I don't see much about statistics since it's mostly diagnostic. But the DSM is still kind of the guideline that's used by insurance companies and, for better or for worse, it's what we have.

Q. Okay. And I said the IV and the V; those are different editions of the same manual?

A. Yes, the V is the most recent edition.

Q. Okay. Let's work from back forward. Under the DSM-IV, what were the criteria for a diagnosis or determination of mental retardation?

A. It would be an IQ of 65 or below, I believe, maybe as much as 70 but it's somewhere in that range, 65 to 70.

Q. With the V, most of the tests have a certain margin for error?

A. Right, right.

Q. Would that be 5 points either way?

A. Yeah, right.

[144] Q. So a testing score of 70 would be—with a margin for error would qualify?

A. Yeah, it's right at the cusp.

Q. Okay.

A. Right.

Q. And what are some of the other criteria?

A. Difficulties in dealing with everyday activities, living independently. Shifting in the DSM-V puts much more heavy emphasis on practical abilities, everyday life.

Q. Okay. Would the ability to read and write be one of those abilities?

A. Well, that's in there but it's not strictly mentioned as—there is a section in the DSM-IV that gets at the ability to communicate, and reading and writing is one of those as well.

Q. It's a subsection of communication?

A. Right, right.

Q. Okay. What about academic achievement? Is that an area?

A. That's typically not even addressed, I think.

Q. Okay. Under the DSM-V or the DSM-IV?

A. I think in both. It's much more heavily weighted toward—the IV is more heavily weighted towards test scores and the ability to function independently and V is getting away from the test scores and looking at adaptive [145] functioning.

Q. Okay. Looking at preparing for today, would you—do you have a copy of the report that you did on this matter in front of you?

A. The affidavit?

Q. Yes.

A. Yes, uh-huh.

Q. Okay. Have you had a chance to review that?

A. Yes.

Q. Okay. Would you go over for the Court and the record what it was you did in preparing to testify on this case?

A. Well, I met with Mr. Moore.

Q. Okay.

A. That's one thing I did. And really did a very, very brief assessment because he had already been formally assessed so many times. I did a mental state exam just, you know, who are you, where are we, what time is it.

Q. Okay. Let's take you back for that.

A. Okay.

Q. You said that he had been assessed many times. Did you get a chance to review all the records, both the ones you'd reviewed in the '90s and other ones that were provided to you by my office and various other parties?

A. Yes.

[146] Q. Okay.

A. Many.

Q. Okay. And in reviewing those, did you find evidence of subnormal intellectual functioning?

A. Yes.

Q. Okay. And could you go over a couple of those, please?

A. Well, because of practice effects in IQ testing, usually the most accurate assessment is the first test that's done and I think in Mr. Moore's case that would have been the Slosson Intelligence Test, S-L-O-S-S-O-N, which was administered in 1972, and on that his IQ score was 57.

Q. Okay.

A. Then there were subsequent measures of—in '73 he was given the Wechsler Intelligence Scale for Children. That was the original form of that. The norms for that would have been in 1947 so they're way, way out of date and—

Q. Let's talk about that for a second. When you say "out of date," tell us what the Flynn Effect is.

A. Professor Flynn published a paper in—I think it was in 2009; I believe that's right—in which he had done a really extensive analysis of IQ test scores given

to people over time. And there's this phenomenon, you know, where every time a new Wechsler Scale comes out, then the [147] norms for that are different but if you give the same test to the same group of people, they'll do better on the previous version than they do on the current version.

And I don't know that anyone has effectively explained why that is. One theory is the population is just getting smarter or they're getting better at taking tests. Doesn't really matter. It's just a statistical anomaly that if you're using normative data that is more than ten years old, then the results you get can be 3 points off for every decade of obsolescence of the norms. So if a test was normed 25 years prior to using it, then the score that you get could be inflated by 8 points or so.

Q. Is the Flynn Effect generally considered to be a real phenomenon that is taken into account by forensic and other psychiatrists and psychologists?

A. Yes, an extensive analysis of that was done by U of H psychology department recently and published in a psychology journal and they verified Flynn's findings almost down to the decimal place. Yes. So whether or not that's accepted, that's not our area. I mean, that's the Court's area. But the Flynn Effect, I think, is well documented and it's not just for IQ tests. It's apparently for—extends to all neuropsychological measures, whether it's motor speed on a grooved pegboard test or whatever, there is this effect that people get better at those things over time.

[148] Q. Okay.

A. The population does.

Q. As a general norm?

A. Yes.

Q. Okay. Let me go back and preface this. You said he took a test in 1972.

A. '3. Oh, '72 was the Slosson, correct.

Q. Okay. And that IQ test was 57?

A. Yes.

Q. Okay. We talked earlier, and granted, that may vary from test to test, there could be some variance and test scores could be off by 5 points or more?

A. Right.

Q. But we talked earlier that a normal IQ would be between—I think you said an average IQ would be between 95 and 110?

A. 90 and 110.

Q. 90 and 110. So this would be well below the norm or average?

A. Yes, that would be below the first percentile, yes.

Q. Okay. And when you say "below the first percentile," you mean the bottom 1 percent?

A. Yes, out of a hundred people, 99 people would score better than that.

Q. Okay. And this would have been taken when this [149] individual was a young person, right, in school?

A. Right, yes.

Q. So there's every incentive to do well at those times, correct?

A. Yes.

Q. Okay. And every incentive and reason to try and do the best one can so that not only your parents are proud, your teachers are proud but you get into a good school.

A. Yes. There's no secondary gain for doing poorly.

Q. Okay. All right. Going back down, did you see some other IQ tests in that range?

A. I mentioned the WISC, Wechsler Intelligence Scale for Children, was given in '73. On that he earned an IQ score of 78 but the norms were way out of date. So, using the Flynn Effect, that would bring his score down to 70. Also was given the Bender Visual-Motor Gestalt Test, which is more of a visual spatial task but does have scores that generally equate with IQ and on that his score was 67, but again, the norms were so far out of date that using a Flynn correction, it would bring it down to a 56. In 1973, again, he was given the Draw-a-Person Test, which also put his—roughly—again, good enough—Draw-a-Person Test does not strictly give an IQ but there is a way of—you can get a percentile score from it and then work backward to get an IQ. And with Flynn's correction, that would put him in the [150] mid-60s. Then in 1989 he was given the Wechsler Adult Intelligence Scale-Revised, the norms for which would have been in 1979, so they were ten years out of date and on that his Flynn-corrected score would be 71. So, there are a lot of—there's a lot of scatter here, for one thing. They're different tests and they measure, to some extent, different skills.

Q. Let's take his—let's say, and forgive me when I use this term, let's take his best scores.

A. Okay.

Q. Let's take the 71.

A. Right.

Q. What percentile of the population scores a 71 on an IQ test?

A. That would be right around the fifth percentile, if I'm remembering right.

Q. Okay. And that was the last test, if I got you correct.

A. Maybe third percentile. Right. Third percentile, right.

Q. So, 95 to 97 people out of a hundred people would have scored better on this test?

A. Correct, correct.

Q. And that was his last test that you got that you saw on the report?

[151] A. Yes, he's been apparently tested more recently than that but I didn't review those.

Q. Let's just—yeah, let's just go with what you reviewed.

A. Right.

Q. And so, this is still well, well below normal intellectual function?

A. Well below average, yes.

Q. Okay. And did you get a chance to review some of the family history?

A. Yes.

Q. Did they indicate that he had strong problems adapting early in both social behaviors, academic realms, all those things?

A. All those, yes.

Q. Okay. Looking at this, when you examined him, what test did you administer, if any?

A. Because there was some suggestion in testing that he had frontal lobe damage and he had a history of multiple head injuries, so I think that's, you know, a reasonable assumption. I gave him something that I couldn't find in the records that anyone else had given him because it's a test that only neuropsychologists give, the Tinkertoy Test.

What is that? I think we all know what Tinkertoys are. It's a set of Tinkertoys. And you put 50 [152] of them on the table in front of the patient or applicant or claimant and the instructions are very simple. It says: Make something. You have—you can take as long as you want but you have at least ten minutes. Let me know when you're through. That's the only instruction given to the patient.

And then you note how many pieces they put together, whether or not they name what they have created, whether or not they have difficulty putting the pieces together, whether they persist in putting pieces together that do not fit, whether or not the thing is three-dimensional, can stand alone, and then it's scored. And it's used a lot in the head injury population. And a score below 7 generally equates with very poor likelihood of gainful employment and poor ability to live independently and also—and this is almost a pure frontal lobe test because there are—there's no structure.

And we've heard a lot of testimony today that Mr. Moore has done very well with a lot of structure in his life, being in the prison, but here's a test where there's no structure whatever, he's never seen the material before and he's just asked to do something with it and

he couldn't do it. He had a score of 1, which is the lowest score I've ever recorded and I've done a lot of testing of brain injury people. So that, I think, is further proof that he has had [153] some significant head injuries.

Q. So, I just want to make sure I understand this. Below 7 indicates severe impairment?

A. Yes, yes.

Q. From whatever cause?

A. Right.

Q. He scored a 1?

A. A 1.

Q. And lower scores are not good. It's not like golf.

A. No.

Q. Okay. And this is a similar, unstructured, albeit timed, test of motor visual skills, spatial appreciation, three-dimensional understandings and shapes, visual acuity and general intelligence, more or less.

A. I think most importantly is the ability to plan ahead, you know, have some idea of what you want to get out of this and take pieces to get to that goal. That's what it measures.

Q. Okay. Looking at this, did you also have a chance to review any other records in preparation either before or since your examination of Mr. Moore?

A. Such as?

Q. Have you reviewed any other reports from any other individuals?

A. Two, I believe.

[154] Q. Okay.

A. Yes. I probably made reference to them in here. Ms. Vitale.

Q. That's Gina Vitale, the licensed master of social work? She's a—

A. Right, right. And Dr. Garnett.

Q. That would be one of the psychologists that examined him prior to this hearing?

A. Oh, and also Dr. Williams-Anderson, a neuropsychologist.

Q. Okay. Is there anything else you'd like to note in your review and preparation for today or your testing or anything else?

A. Well, again, you know, we've heard a lot of testimony today of how well he has done in the extreme structure of his current environment and to his credit, he has—has found a way to do well in that environment and to enhance his ability to do academic skills. And I don't mean to discount that in any way but, you know, it's taken him, what? 30 years to develop skills that normally would be done in elementary school. So, although that certainly is to his credit, I don't know that that necessarily speaks to his having gotten brighter. I think he's just learned to do more tasks than he was able to do before.

Q. So, in looking at that, and let's put that in [55] perspective, it's taken him 30 years to do simple addition?

A. Right.

Q. It's taken him 30 years to learn to write a legible letter?

A. Right.

Q. And perhaps to read at an elementary school level?

A. That's my impression, yes.

Q. Okay. That does not indicate normal intellectual functioning to you.

A. Not to me, no.

Q. Okay. Is that because of the length of time it took him to master and achieve that basic level of skill?

A. Yes. And that certainly is not expected from average people in our society to take that long. He's a very slow learner and that kind of—we've heard that again and again, many repetitions to get him to learn something.

Q. And I want to put this in perspective also before we go on to a couple of other questions but in terms of intellectual ability or functioning, it's taken this long to get to a basic level, not an advanced level of intellectual functioning or proof of skills that indicate intellectual functioning?

A. Yes.

Q. So basic literacy and some numerical skills which can be practiced over and over again in a closed-cell [156] environment, literally.

A. Right, with very specific tasks that are the same from day to day, right.

Q. For instance, if you had a commissary sheet that was more or less unvarying for 14 years, you could eventually get to a place where you could add up those prices?

A. Right.

Q. And in terms of letter writing, if you practiced—sadly, Sister Mary Alice attempted to get me to practice cursive—but if you practiced cursive for hours and worked on it so that people would see the letters that you wrote and you would be proud of those letters, like a child.

A. Right, yes.

Q. Then that is not indicating normal functioning, is it?

A. No, in a—most of us have learned how to write cursive well before the age of 8 or so, 9 anyway.

Q. So a man who's able to do that at some point in his 30s or 40s and doesn't progress beyond that—

A. Well, again, to his credit that he's able to do it but we're comparing that ability to that of the normal population and it's clearly not normal to do that, take that long to do that.

Q. Now, we know that he had a difficult childhood.

[157] A. Yes, that's fair.

Q. Okay. Certainly that didn't help his intellectual development, did it?

A. No.

Q. But there's a difference between not being helpful and not having the tools to actually advance oneself, correct?

A. Yes.

Q. Okay. Does Mr. Moore fall in the latter, not having the tools?

A. I would say he's very limited in that area and that's certainly not helped any by the background,

with the very authoritarian father who ended up creating a very dependent sort of child that was very fearful.

Q. Okay. So, certainly nothing you would wish on any child?

A. Oh, heavens, no. It's a horrible background.

THE WITNESS: I'm sorry, Mr. Moore, it was. Just a fact.

Q. (BY MR. MCCANN) Okay. But that doesn't change the tool kit he started with, does it?

A. Exactly.

Q. Having reviewed these records over periods of years and having looked at other professionals' reports and having examined Mr. Moore yourself, do you have a clinical opinion [158] as to whether or not he meets the criteria for a diagnosis or a determination of mental retardation?

A. In my opinion, he would, yes.

Q. Thank you.

* * *

Q. (BY MR. PEEBLES) Dr. Borda, you had—when asked to define mental—or what used to be called mental retardation, you had indicated it was operating well below the average intellectual ability and then you said sometimes it's evaluated using a number, sometimes it's based on adaptive functions but it's not really one or the other, right? There has to be a link between those two, doesn't there?

A. It depends on what definition you're using.

Q. So then are you suggesting there's not a commonly accepted method of evaluating someone and

determining whether they're mentally retarded right now?

A. I think it varies from state to state and from institution to another. I think a numerical kind of IQ testing is still very important but I think more important is adaptive abilities.

Q. So, if it's a little bit subjective based on the [159] examiner and the way the examiner wants to approach it, then it's fair to say that there may be other neuropsychologists such as yourself that would reach a slightly different conclusion than the one you did?

A. I can't speak for them.

Q. What exactly is standardized adaptive testing?

A. Well, over the years there have been several tests of functional daily abilities, such as the Vineland, that look at different areas of ability to care for self, interact with others, take care of your own basic needs and there are numerical scores that are derived. These can either be done from direct interview of the person in question or by secondary information from family members or teachers and then you can end up with a global assessment of functioning score from that.

Q. Let's do this. Can you walk me through your personal—not what you relied on from someone else, what they did, but what have you personally done with Mr. Moore as far as your interactions with him and any tests you have administered to him ever since, you know, as long as you've known him.

A. Well, I've only actually known him for about a month. I'd never met him before. I've only looked at his records.

Q. Okay.

[160] A. So, what part of that do you want me to answer?

Q. So, prior to one month ago, you'd never met him; you'd never administered any tests yourself?

A. That is correct.

Q. And a month ago, you saw him, I presume, at the Polunsky Unit?

A. No, very near here at the Harris County Jail.

Q. Okay. What did you—what tests did you administer to him a month ago?

A. I gave him part of the Mini-Mental State Exam, which is really just very basic stuff, you know, who are you, where are we today, what day is it, some—

THE COURT: I'm sorry. What's that called?

THE WITNESS: Mini-Mental State Exam.

THE COURT: Thank you. Sorry. I just couldn't hear you.

A. Asked him to remember three words and I told him I'm going to ask you later what they were and then repeated them several times, made sure that he could repeat them back. So, I mean, he heard them. And he was able to do that. And maybe 20 minutes later I asked him again what those words were; he gave me one of them. Not good.

I gave him the Raven's Coloured Matrices test, which is very similar to the part of the Wechsler Scale that involves matrices, so he may have already been exposed to [161] things like that and that can give a general index of intellectual ability.

Q. (BY MR. PEEBLES) If I can interrupt you just for a second.

A. Yeah.

Q. You mentioned he may have been exposed to something like that and it sounds like you're suggesting that practice effects might come into play. Is that what you mean by that?

A. Oh, very definitely, yes.

Q. But doesn't—now that—American Association on Intellectual and Development Disabilities, which is formerly the AAMR, right? That's kind of the standard—commonly accepted group for mental retardation across the country, isn't it?

A. I believe so, right.

Q. And the DSM-V, and formerly the DSM-IV is the standard, you know, manual resource guide that is commonly accepted across the community, right?

A. Yes.

Q. Don't these organizations say that practice effects are nonexistent after seven years?

A. It depends on the test but when—if—and it also depends on how many times the test has been given. If you give the Wechsler test in every one of its versions, you [162] know, like, every three or four years, there's an obvious practice effect which may account for as much as two-thirds of a standard deviation on repeated measures.

Q. Well, when you went and saw him a month ago, he hadn't really been subjected to any kind of meaningful testing for over a decade, right?

A. I suppose that's correct.

Q. And so, really, practice effects at that point wouldn't enter into your area of concern, would they?

A. I think, you know, it's always a concern, which is why I picked the Tinkertoy Test because he'd never seen that before and also because it's a test of frontal lobe ability.

Q. Frontal lobe, does that imply brain damage?

A. Well, it's a test of frontal lobe functioning. Whether or not that's due to damage or just developmental lack of abilities in that area, it doesn't really matter. It's just—it's a test of executive functioning, which depends on the frontal lobe. I see it most commonly in people with head injuries.

Q. If someone has a problem with the frontal lobe and their executive functioning, say, isn't up to par, that's a permanent condition, right?

A. Usually.

Q. It's not something that's going to be reversed, improved in the future?

[163] A. Well, again, it depends on the cause. I mean, you can get a frontal lobe dysfunction from exposure to various chemicals and drugs but that could go away; but if it's, you know, due to a stroke, you might get some improvement and that—over time much of it will be permanent.

Q. The Tinkertoy Test that you chose to administer, do you know what the validity range on that test is?

A. I don't.

Q. Or the specificity of that test?

A. It's just generally accepted to be a test of frontal lobe functioning and I said it doesn't strictly equate to IQ. It's more of a practical measure of ability to plan ahead, think things through, work towards a goal.

Q. And you mentioned that you essentially take some Tinkertoys, put them in front of him, tell him, Build anything.

A. Yes.

Q. You've got at least ten minutes but you can go on forever if you want.

A. Yes, right.

Q. Right? So when you were—I think there was a question that was a timed test. It's not really a timed test. Somebody has as much time as they want.

A. You're quite right. You're very sharp. Picked up on that.

[164] Q. Well, thank you. Did—was Mr. Moore able to build anything with those Tinkertoys?

A. He used a total of eight pieces and basically made a square. That was it.

Q. Is a learning disability the same as mental retardation?

A. Not the way it is typically used. Again, mental retardation will be associated with difficulty learning but usually the term "learning ability" is specific for difficulty learning either verbal or nonverbal material in the absence of a global impairment of intellectual functioning.

Q. So, they could exist together but they aren't really linked to one another? Is that what you're saying?

A. That's a hard one to answer because people with mental retardation will have difficulty learning things but by definition, learning disability is something that is present in the absence of global impairment of

intellectual disability. So, although, yes, MR will be associated with, difficulty learning, a learning disability, per se, is not the same thing.

Q. Is it possible that other factors can affect someone's ability to learn, such as emotional disturbances that they're going through?

A. Sure.

[165] Q. Environmental conditions?

A. Yes.

Q. Like a abusive household, right?

A. All those things. Just having parents that are not intellectually curious can affect learning.

Q. In the documents that you reviewed, did you see an evaluation done when Mr. Moore was 13 that said he was likely a child who could learn; he just hasn't been taught?

A. I did not see that.

Q. Are you familiar with whether anyone besides yourself has diagnosed Mr. Moore as being mentally retarded?

A. Well, those people I just mentioned.

Q. They actually diagnosed him as being mentally retarded?

A. That was the conclusion that they had arrived at. Whether or not you call it a diagnosis or whether or not he just fits in that category, I don't think, is really much of a distinction.

Q. In your interaction with Mr. Moore, you never gave him a full-scale IQ test?

A. No, I did not.

Q. Can depression affect somebody's scores on an IQ test?

A. Typically it will affect the nonverbal tasks more because they're timed and depression can cause people to [166] think more slowly so they will do more poorly. The simple answer is, yes, IQ scores can be suppressed to some degree by depression.

Q. And about the—let's take death row as an example. That's probably a big motivator for someone to try to maybe alter their score on an IQ test.

MR. MCCANN: Objection, calls for speculation, since I don't believe that our witness has ever been to death row or knows anything about it.

THE COURT: I'm going to overrule that. I think you can ask him that question as far as his knowledge goes.

A. So, again?

Q. (BY MR. PEEBLES) Could the specter of facing the death penalty affect motivation or depression and therefore affect performance on mental health tests?

A. Well, it certainly could but, you know, over the past 30 years, he's been tested several times and the scores still vary around the upper part of—

Q. I understand—

A. —mild MR.

Q. Could depression—I'm sorry. Could the specter of the death penalty affect motivation or depression and therefore affect the results of a mental health examination? Yes or no?

[167] A. It could, sure.

Q. You suggested that Mr. Moore showed poor adaptive skills as an adolescent. There are plenty of people who have poor adaptive skills as adolescents that don't fall into the mental retardation category, right?

A. Sure.

Q. Like homeless teens, for example?

A. Right.

Q. They're thrust out of their house and they don't have those adaptive skills to live and they live in makeshift shelters and things like that, right?

A. Right.

Q. It certainly doesn't mean that if somebody hasn't been taught skills that they're automatically mentally retarded.

A. Could not agree more.

Q. Doesn't the fact that when Mr. Moore was a kid he mowed grass for money and hustled pool suggest that he had some adaptive skills?

A. I'm not saying he had no adaptive skills. I'm just saying that they were probably below average for someone of that age.

Q. Money skills, the knowledge that I need to make money and going out to get a job to make money, that would indicate adaptive functioning, wouldn't it?

[168] A. Well, I haven't seen anything that indicated whether or not this was something he was just told to do or whether or not he had the idea that he wanted to make money to buy something and the way to do that was to go, you know, do some part-time work and make money, I don't know.

Q. Did you ask him any of those questions when you saw him last month?

A. No, no.

Q. The—kind of the behavior of this very crime indicates some adaptive skills, doesn't it?

A. I really don't know much about the specifics of the crime. My impression is that he got kind of dragged along on this by people that he was afraid to say no to. I don't think it was as much of a planning involved in this.

Q. Have you read the confession that Mr. Moore wrote?

A. No, I've not.

Q. When he was arrested? If, hypothetically speaking, it says, We drove around, we talked about a place to rob—

MR. MCCANN: Objection, Your Honor, since, as admitted, he hasn't read the confession, questioning from an item that he hasn't read seems both unfair and speculative.

THE COURT: Overruled.

Q. (BY MR. PEEBLES) If that confession suggested that he was with two other people and they planned this in advance and rode around in a car, that would indicate some [169] adaptive behavior and some planning and forethought, wouldn't it?

A. Again, we don't know who was doing the planning here, whether or not Mr. Moore was just, you know, along for the ride or whether or not he was involved in a planning process, I don't know.

Q. If Mr. Moore wore a wig during the offense, would that indicate some adaptive skill?

A. I have no idea. Maybe he was just given the wig, you know, put this on. Again, we don't know. I wasn't there.

Q. Well, if the testimony said Mr. Moore wore a wig, concealed a shotgun in a shopping bag so it, you know, it wouldn't be seen, even shaved his head after the offense before he was arrested, would these things indicate some kind of forethought or planning, you know, and intent to avoid being caught?

A. I can see your point. Could be.

Q. Have you read Mr. Moore's testimony from his trial?

A. No.

Q. If, for example, Mr. Moore had taken the stand and was questioned by the prosecution and questioned by the defense and listened to those questions, responded in manners that would be appropriate given the context and circumstances, that would indicate—

[170] MR. MCCANN: Objection, vague.

THE COURT: Can we let him finish his question?

MR. PEEBLES: I'm sorry?

THE COURT: Go ahead.

Q. (BY MR. PEEBLES) I'll start over.

If the—if Mr. Moore sat on the witness stand just like you in his trial and was questioned by both lawyers, listened to the questions, answered appropriately given the circumstance and the context, that

would indicate an ability to listen, assimilate information and respond appropriately, wouldn't it?

A. It would seem to be, yes.

Q. You have also seen some advances that Mr. Moore has made since he's been in prison, haven't you?

A. Have I seen them?

Q. Yes.

A. I've heard them reported. I haven't—again, I've only seen him once.

Q. Okay. So, you don't have any personal knowledge of whether his ability to read or write has increased dramatically since he's been in prison?

A. No.

* * *

[171] Q. (BY MR. MCCANN) Let me clear up a couple of things. In '72, Mr. Moore would have been 13. That's when he got the first IQ test of 57?

A. Right.

Q. Is that correct?

A. Yes.

Q. Okay. Would he have been under the specter and depression of death row at that time?

A. No.

Q. Okay. In fact, given the history that has been given by the family, he would have had every incentive to do well on such a test so that he would not be beaten by his father, wouldn't he?

A. I would think so, yes.

Q. Let me also sit there and go through. After correcting for Flynn Effect, is there any IQ test that indicates even normal or average intellectual functioning?

A. None.

Q. Okay. And by the way, the first test was given when he was 13, if he was born in '59 and he was taking it in '72, right?

A. Right.

Q. So, that would have been well before the age of 18 [172] correct?

A. Yes.

Q. And one of the criteria in the old DSM-IV used to be onset of subnormal intellectual functioning prior to the age of 18, wasn't it?

A. Correct, yes.

Q. Okay. By the way, I apologize for this because I believe I screwed up my question but under the old DSM-IV, the—and the old American Association for the Mentally Retarded, the normal accepted IQ range of score would have been somewhere around 70 with a 5-point plus or minus and I think I phrased it incorrectly to you that it was 65 plus or minus 5; it's actually 70 plus or minus 5, so a score between 65 to 75 could actually qualify one as retarded, correct?

A. Yes. It's right on the cusp of borderline to retarded.

Q. And I guess I wanted to go through some of these things just real quickly as well. Someone who is suffering from an intellectual disability, are they typically suggestible in your experience?

A. Yes.

Q. So if they're told what to do, they do it?

A. Yes. That's one way they've learned to get by. In Mr. Moore's case, to avoid getting punished.

[173] Q. Okay. Okay. And would it be irrational for someone to be told by someone else planning a robbery that, Hey, put this wig on and put this gun in a bag; you're going to come with us.

A. At the risk of doing myself some harm, I'd say that's the way I'd do it.

Q. We're not suggesting you have experience in this area.

A. Right.

Q. We're just saying does that seem unsensible to you?

A. No, it does not.

Q. Okay. And even if one of the ideas was your own, if you put a gun in a bag to carry it, is that irrational?

A. No.

Q. Does it indicate actual planning or just putting it in something, you can carry it?

A. It could be either. I don't know.

Q. Okay. But let's be clear. This is not the Brinks job that was pulled off.

A. Right.

Q. Okay. In terms of planning, this was not a blueprint that was analyzed by someone. That was not a safe-cracking job. This was not anything that your

normal 7- or 8-year-old couldn't have come up with in ten minutes?

A. I think that's probably correct.

[174] Q. Okay. Doctor, look at this from your experience. You've interviewed how many folks and assessed them for federal benefits for intellectual disability?

A. I don't actually evaluate people for disability. I evaluate the case file.

Q. Okay. Fair enough. How many of those have you evaluated? Over a hundred?

A. Oh, yeah, well over.

Q. Over 200?

A. Probably, yeah.

Q. Okay. You've been practicing how many years?

A. Since 1985. So, you know, getting close to 30.

Q. Okay. And you've examined hundreds, if not thousands, of patients yourself, correct?

A. Yes.

Q. Okay. How many times have you given that spatial perception test, the one you call the Tinkertoy Test? Over 50?

A. Yes.

Q. Okay. Over a hundred?

A. Probably not because I wouldn't use it with the entire population, just those that have had a head injury, typically.

Q. Okay. So, out of 50 or more people with severe enough head injuries that they're applying for benefits, Mr. Moore got the lowest score?

A. In my experience, right.

Q. Okay.

* * *

[175] Q. (BY MR. PEEBLES) With respect to that Tinkertoy Test, did you do any kind of effort testing or malingering testing before you gave that test?

A. There really is no good effort or malingering test for people that are not of average IQ. Most of them involve memory, so if they really do have a memory problem, they're not going to do well, like on the Test of Memory Malingering. Did I give any? No, because typically they're not normed for that population.

Q. However, when you go into the test, you don't know what his IQ is, right, so you can't assume that it's too low to administer a malingering test, can you?

A. Well, because of all the records I reviewed, I had a pretty good idea. But also just the way the person approaches the test is a—I mean, for someone with, you know, 30 years of clinical experience, you get some feel for [176] what people do when you give them tests and they just look out the window and don't make eye contact and, you know, don't have any interest in it, that's pretty obvious but if they're really seeming to follow instructions and try, I don't think that's much evidence for malingering.

Q. You're not saying that effort testing is inapplicable to folks that are mentally retarded, are you?

A. Not saying it's unapplicable. It's just I think in a forensic setting, the use of tests that have not been normed for people appropriate to that are specious.

Q. What about somebody who's borderline?

A. I don't know of any studies that have looked at that. I don't know.

Q. So then—okay. This Slosson IQ test that you talked about in 1972 that he scored a 57 on?

A. Yes.

Q. That's a group test, isn't it?

A. I believe so, yes.

Q. It doesn't have a lot of validity behind it, does it?

A. It's not one that's widely used. I think the Wechsler is more commonly used or the Raven Matrices, which is also group administered.

Q. Mr. McCann had asked you about someone like Mr. Moore, for example, being very suggestible. Do you [177] remember that?

A. Yes.

Q. Because of, I guess, the implication is diminished mental capacity renders one more suggestible than others to the point that they're likely to just do whatever they're asked, right? Is that what you meant?

A. Yes.

Q. And I understand you don't know much about the facts of the case but let's assume hypothetically that someone was arrested and police tell them, I want you to sit down and write a piece of paper out, you know, as to your involvement in this, and they said,

I'm not doing that, no way, that would be the opposite of being suggestible, wouldn't it?

MR. MCCANN: Objection, relevance and speculation.

THE COURT: Overruled.

MR. PEEBLES: It's a hypothetical—thank you.

THE COURT: Yeah.

Q. (BY MR. PEEBLES) Wouldn't that be the opposite of someone who's suggestible and does what they're told?

A. Ask that again. I lost track somewhere in there.

Q. Okay. If someone is suggestible, as you put it, due to low mental functioning and they're likely to simply [178] agree or do whatever that they're asked, then wouldn't you expect if they were arrested and the police said, I need you to write this statement as to your involvement, that they would do it because they're suggestible?

A. I would expect that they would.

Q. And so the converse would be if they said, Absolutely not, I'm not signing anything, would be the opposite, it would be contrary to being suggestible, right?

A. Especially if they also said, Not without my attorney being present.

Q. What about somebody that said, Nobody that's ever been to prison before would ever sign a confession? Would you expect something like that to come out of Mr. Moore's mouth?

A. No.

Q. And you've admitted that you didn't know very much about the case.

A. Yes.

Q. Mr. McCann said this isn't a complex case. It's not a bank robbery or whatever—however we put it. But the fact of the matter is if I sat here and said Mr. Moore was arrested after he fled to Hawaii, you would not know if I'm telling you the truth, would you?

A. No.

* * *

[179] Q. (BY MR. MCCANN) The Slosson test—I thought we had discussed this, Doctor—isn't that an individual test, also? It's an individual test that can be administered?

A. I think, like the Raven, it can be done either way.

Q. Either way, it's not a test that you would administer now?

A. I've never even seen the test. No, it's not one I would use.

Q. Okay. But it did it was given well before 18 and did show 57?

A. Yes.

Q. Thanks.

* * *

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FORENSIC NEUROPSYCHOLOGICAL EVALUATION

Name: Bobby Moore

Ethnicity: African American

Date(s) of Evaluation: 11/22/2013
12/06/2013
12/19/2013

Medical Record/ID #: CAUSE NO. 314483-A

Gender: Male

DOB: 10/19/1959

Reason for Referral:

Mr. Bobby Moore was referred for a neuropsychological evaluation by his attorney and legal team to help determine his overall level of functioning. Specifically, the evaluation was conducted to determine the possibility and effects of organicity and/or acquired brain injuries.

Assessment Tools:

Unstructured clinical interview with Bobby and his family,

Review of records,

Mini-mental Status Exam (MMSE),

Rey Complex Figure Test (RCFT),

Symbol Digit Modalities Test (SDMT),

Trails A& B,

Hooper Visual Organization Test (HVOT),

Controlled Oral Word Association (COWA),

California Verbal Learning Test-II (CVLT-II),

Delis-Kaplan Executive Functioning System (DKEFS)

Wide Range Achievement Test-4th edition (WRAT-4)-math subtest,

Wechsler Adult Intelligence Test-IV (WAIS-IV)-math subtest.

Behavioral Observations:

The entire evaluation with Bobby was conducted in the contact visitation room of the Polunsky Unit (unless otherwise indicated), where Bobby is currently being housed. The testing room contained a round table and 3 chairs. A corrections officer was posted on the opposite side of a double-paned, plexi-glass window. Bobby was escorted to the testing session by 2 corrections officers. Bobby wore shackles on his wrists and ankles, but was able to ambulate to the table with little assistance. His wrists were released to allow him to give written responses.

Bobby presented in a white, standard issued jumpsuit. He appeared his stated age. He was likely slightly above average height and within his average or ideal body weight. He was appropriate and cooperative throughout the testing. His demeanor and presentation were respectful at all times, thus rapport was easily established and maintained. His eye contact was somewhat inconsistent. He reported that he used reading glasses for corrected vision, but did not have them at the time of testing. However, he reported

being able to see all test stimuli accurately and without incident. His mood and affect were within normal limits for the situation, although he seemed somewhat shy and reserved. His thought processes were coherent, and he did not appear to be attending to unseen external stimuli. He denied the presence of auditory or visual hallucinations.

His speech was minimal and at a lowered tone. He answered all questions posed to him. However, he spoke in short and discrete sentences and had to be asked to expound on his answers. His speech lacked a level of complexity, skill and proficiency that would be expected for his age. For example, when asked if Bobby was short for another name, perhaps Robert, he said, "No, Bobby." He seemed baffled and completely unaware that Bobby is often a nickname for Robert. He also displayed some deficits in receptive language as test instructions had to be repeated on several occasions.

Bobby was made aware of the purpose of the evaluation and given the opportunity to ask questions. His attention and effort were judged to be good and he seemed to answer all questions and test items openly and frankly. He was able to attend to and follow all instructions to completion; although prompts and redirection may have been needed. The testing session, including the initial diagnostic interview, occurred across 4 hours. Bobby's family was also interviewed on a separate and subsequent occasion for approximately 2 hours. The family provided insight into Bobby's course of development. Lastly, Bobby's computation skills were assessed on 12/19/2013 after he was relocated back to Houston.

Background/Social History:

Bobby Moore is a 54-year-old, right-handed African American male. He was able to give an account of his psychosocial history. He reported that he was born in Coushatta, LA, and raised in South Houston. He stated that he moved to Houston with his family when he was approximately 3-5 years old. He reported that to the best of his knowledge there were no complications surrounding his birth, but recalled that he was a "sickly" child. He could not elaborate or give definitive diagnoses. He reported that he reached most developmental milestones at the appropriate ages; with talking being the exception. He stated that he had to "train [him]self to talk" when he was 18-19 years old. He also reported that he had difficulty with expressive and receptive speech as a child and characterized his difficulties as a speech impediment. The family acknowledged and confirmed that Bobby had speech difficulties and that they often had to translate and assist him with communication.

Bobby reported that he was born the fourth of 9 children. He reported having an abusive and tumultuous upbringing. He stated that his father was an alcoholic and was physically abusive to the family. Discussion with his family revealed constant and severe abuse. Mrs. Alice Moore, the maternal aunt, stated that Bobby's father was violent and abusive towards her sister early on. She stated that she was not always welcomed in the Moore home because of her disdain for the father and his control over the family. However, she reported that she would often have the female siblings stay at her home and the girls considered it a refuge. Mrs. Alice Moore stated that she was unaware of the severity of the abuse until a neighbor brought her sister to her home, after that neighbor found her

sister bloody and beaten in a ditch. The siblings confirmed this account and added that Bobby received an unequal amount of the father's abuse. It is unclear to why that would be, but the siblings and aunt hypothesized that it may have been because of Bobby's slowed intellect and impoverished communication. The sister remarked that the father would often give Bobby a command/directions and Bobby likely had difficulty discerning what was being asked of him and would remain still. The sister reported that their father would hit Bobby and yell, "Do you hear me?," and continue beating Bobby although he still had not gained full understanding of what he was being asked. He reported that his father died of cancer 13 years prior, while his mother suffered a cerebrovascular accident approximately 2 years ago. Bobby never married or fathered children.

Academically, Bobby historically demonstrated delays and problems with learning. He reported that he was aware of his difficulty to learn and had a difficult time in school. He stated that he [I] "would just sit there" and hoped no one would notice he was not able to learn the information. He recalled being retained in 1st grade and being socially promoted every grade afterwards. After being retained, his younger sister and a cousin became his classmate and would assist him with classwork/homework. The cousin, Ms. Parneva "Shirley" Williams, was present during the family interview and recalled not only helping Bobby with homework, but assisting him to understand the classroom rules, concepts, and navigating the school. Records indicated that Bobby's intellectual capacity was constantly questioned by school personnel and often tested. His scores typically fell in the borderline capacity or mentally retarded/deficient ranges. It is unclear if Bobby ever received formal special

education services, as records indicated that he was "allowed to draw" while in the regular classroom setting. He reported having 7 years of formal education. He stated he was essentially unable to read or write until he received assistance from other inmates while incarcerated.

He reported being self-conscious about his speech, and slowed learning. He stated that his deficits were apparent to others and that in approximately 5th grade, his teacher at the time would arrive to school early and stay late to tutor him. He also recalled that the teacher worked with him in her home and attempted to take him home to inform his parents of his level of difficulty and let them know of possible services, and was either not allowed in the home or no adults were present. Bobby stated his teacher made at least 5 attempts to contact his parents.

Socially, Bobby described himself as being shy and reserved. He stated that he was often made fun of in school by his peers and his older siblings had to protect him. His siblings corroborated his statements and added that 1 or more siblings would always be with Bobby for safety and guidance. Bobby stated that one of his few friends in school "had problems" and would follow him around. His family relayed that the friend was deaf and mute and that Bobby saved the friend from drowning after bullies pushed him in a swimming pool. The family explained that Bobby was "timid, gentle, and simple." They stated that he was embarrassed by his deficits and did not interact with many people, but was gifted when interacting and training animals.

Reportedly, he often had many loyal pets that he cared for and found solace. Additionally, Bobby participated on his school's swim team. When specifically

asked about his ability to train animals and swim, he was able to relay that he tended to learn by watching people rather by formal, verbal instruction. He stated that he learned to swim by watching people at a neighborhood pool; and learned to train animals by watching an older male neighbor train his dog.

Bobby reported that he was thrown from the family home when he was approximately 13 years old. He recalled the precipitating incident was that his father was physically abusing his mother and he intervened. His father discharged him from the home for standing up to him and questioning his authority. Bobby stated that he lived on the street from ages 13-17. His family relayed that Bobby attempted to return to the home on at least 3 occasions, but he was forced away by his mother who feared both their safety and retaliation by the father. Bobby further relayed that he was allowed to sleep in the back of a neighborhood pool hall. He stated that he would play pool, do odd jobs for others, and cut grass for money.

Bobby has been incarcerated since the age of 19. He was convicted of Capital Murder charges and sentenced to death. He reported that he was the youngest of 3 perpetrators involved in a robbery where the store clerk was killed. Bobby explained that he was accosted by 2 men; one of which he was somewhat familiar, as the man had a notorious reputation in the neighborhood. He stated that the men informed him that they were aware of a way he could "make real money." Bobby reported that he refused to participate when the men initially approached him, and they proceeded without him. On the day in question, Bobby stated that the men had plans to rob a convenience store. The store clerk "went for" the gun he was holding during the robbery, and as Bobby retracted

the gun to place it out of reach from the clerk, the gun forcefully hit the wall and discharged. He recalled the year of the incident as 1979. He also recalled that his case was overturned in 1999 and that a new trial was ordered in 2000.

Medical/Psychiatric History:

As mentioned earlier, Bobby reported being a "sickly child." He also suffered several traumatic brain injuries. Some injuries were secondary to the frequent beatings he sustained from his father. Specifically, there was an incident that the family recalled where Bobby was hit with a chair by his father and sustained significant injury. Additionally, there was an incident where there were symptoms of post-concussion syndrome. Bobby discussed that the incident occurred when he was in 5th grade and due to integration was bussed to a predominantly Hispanic school. He stated that the neighborhood children were often taunted and the bus attacked. He reported that a young schoolmate threw a brick at his school bus and the brick hit him in the head, just above the right orbital bone of his eye. He reported a brief interval of loss of consciousness, excessive bleeding, and decreased vision in his right eye. He stated that he was required to wear a patch on his right eye for approximately 2-3 months. An overt and noticeable scar was visible above his right eye.

On a separate occasion where brain injury was probable, Bobby reported falling when attempting to "jump a train." He stated that he was trying to pass between the cars to get to the other side while the train was moving a slow speed. He reported pushing away from the train and falling backward as the train suddenly increased its speed. He reported a protruding contusion on his forehead. He stated that he

returned home with symptoms of dizziness, headache, some nausea, and a swollen forehead. He reported that his siblings cared for him when he returned home. He noted the malformation on his forehead that is likely a crude and untreated suture line from a cracked skull.

Test findings:

Cognition—

Bobby was not administered a full measure of intellectual capacity during the current evaluation. He has been exposed to many such tests since approximately 1973 (age 13) and practice effects may preclude an accurate estimate. However, a review of available records which included intellectual quotients, and other test findings from the current evaluation, indicated that Bobby likely falls in a deficient range of measured intelligence. This contention is based not only on the confidence intervals of previous scores, but his lack of adaptive skills. Additionally, a large amount of records were available for review for the current evaluation, including findings from prior testing, and test results with interpretation.

It could be argued that Bobby was able to navigate his surroundings and live independently on the streets. However, careful analysis revealed that Bobby was not instrumental or solely responsible for his survival during his years of homelessness. More likely than not, he functioned at the mercy and grace of others (i.e., being allowed by the pool hall owner to sleep there and play pool for money; neighbors having him cut grass), rather than developing the means himself. Additionally, when he did operate without the influence or input of significant and trustworthy

others, he came up with maladaptive solutions with failed attempts (i.e., robbery).

Lastly, Bobby's lack of developmental prowess cannot be ignored. A child that required the level of assistance from family and friends to communicate, navigate his surroundings, and remain safe is not likely to become self-sufficient simply because his circumstances dictate such. That is, if Bobby required help and guidance before being expelled from his parent's home, he would require some level of adaptive/functional care when living a transient lifestyle. Thus, his adaptive abilities are also judged to be deficient.

Verbal Memory—

The CVLT-II is a test of verbal memory that requires the examinee to recall a list of 16 words that are repeated across five trials. The examinee is asked to recall the words after a brief delay and again after 20-25 minutes. Bobby was able to recall as many as 6 of the 16 words from the original list after the fifth trial. This performance is classified as mildly impaired. He tended to somewhat benefit from exposure and acquired slightly more words across trials; however his range of acquisition was small. That is, he recalled between 4-6 words, which varies by only 2 words despite multiple trials. This may suggest a limited capacity to store information. Following a brief delay, Bobby was able to recall 6 of the words from the original list. This performance is classified in the low average range. However, when given cues he lost several words and could only recall 1 word. After 20 minutes, he could again free recall 6 of the 16 words. When cued, he again recalled 1 of 16 words. This performance is in the severely impaired range. Most individuals perform better when given cues about

what they have learned. In the case of Bobby, it seems that he did not fully understand what the categorical cues meant, and did not acknowledge those words. Thus, cueing did not seem to help his recall abilities. Overall, Bobby has fairly intact memory skills, but may be only able to retain a definitive amount of information, as opposed to being able to employ strategies to recall beyond his limits. His scores would suggest that he has a reduced capacity to learn.

Visual Perceptual/Visual Memory—

Bobby was administered the RCFT. This test requires the examinee to copy an abstract figure with a visual stimulus card present. The RCFT was administered to assess visual processing and perceptual abilities. Bobby was able to complete this task with no errors. However, he completed the task slowly and precisely. He tended to want to have the aspects exact and precise. He approached the task in a piecemeal manner, which is to perceive small aspects of the gestalt or entire stimulus. This approach is typically taken when the examinee is overwhelmed by the stimulus complexity or cannot process the large amount of stimuli/information at once. He tended to use dark, distinct sketch lines as if he were unsure of himself and had to check the stimulus card for accuracy. He completed the task in 412 seconds, which is very slow compared to his normative group. His scores fell in the borderline-moderately impaired range; not because of perceptual deficits (he received full credit for visual aspects), but because of the additional time required to complete the task.

Bobby was also administered the HVOT. The HVOT is a measure of visual organization and mental rotation ability. The examinee is to view 30 items that are cut into puzzle-like pieces and determine what the

stimulus might be if put together. Bobby was able to complete this task with 3 errors. The errors were common misperceptions and did not represent a gross error in perception. His overall score fell in the average range (T=43).

Processing Speed—

Trails A is a test of scanning and visual-motor processing speed. The subject must draw lines to connect consecutively numbered circles as quickly as possible. This task measures processing speed and requires visual scanning, intact fine motor skills, and visual perceptual skills. Bobby's performance is classified as severely compared to individuals his age. He was able to complete the task in 97 seconds, with no errors. This is slowed and falls in the deficient range (T=25).

Trails B is a test of visual-motor scanning, divided attention, and cognitive flexibility. Similar to Trails A, the subject must draw lines to consecutively connect alternating numbers and letters as quickly as possible. Trails B is more complex than Trails A. Bobby required 303 seconds to complete this task (T=27). Bobby's performance was classified as severely deficient when compared to individuals his age. Although he completed the task, he made 3 errors when he could not shift from one cognitive set while maintaining the order. This performance suggests that Bobby may make errors when he has to process differing and/or complex information quickly.

The SDMT is also a measure of cognitive processing speed. The SDMT requires visual scanning, visual discrimination, visual memory, fine motor skills, and cognitive speed. The SDMT employs two response trials consisting of written and oral response modes.

The examinee is required to write a number associated with a novel symbol, with visual stimulus cues being continuously given. Bobby completed 32 of the 110 items, when writing responses. This score is in the borderline impaired range. He did not make errors when completing this task, but was slow when doing so.

Language—

Because Bobby exhibited some difficulty with verbal fluency and word-finding during interview, and acknowledged long-term deficits in this area, a full test of verbal fluency was administered. He was administered the C.O.W.A. The C.O.W.A. entails giving verbal responses that begin with a particular letter within a 60-second time frame. This procedure is repeated across 3 trials with differing letters. Bobby was able to produce a combined total of 17 words. He gave as many as 7 words beginning with a specific letter, and as few as 4. His overall raw score fell at the 1st percentile and in the deficient range. This score is similar to scores of verbal fluency produced on the DKEFS (see next section). If Bobby's language scores are corrected for his lack of education and his grade attainment, his score is then at the 11th percentile and in the low average range.

Executive Functioning—

Bobby was administered selected subtests of the DKEFS test to assess several areas of executive functioning abilities. When interacting with Bobby, these areas seemed to be the most impoverished and can be subtle and difficult to detect. On the DKEFS, he demonstrated great difficulty on higher order tasks such as reasoning and verbal fluency. He was administered the Verbal Fluency tests and Twenty

Questions Test. He scored in the moderately impaired range on each task. The verbal fluency subtest required him to verbally give words that were associated with a stimulus, such as animals, in an allotted time. The Twenty Questions subtest is a measure of deductive reasoning. He was able to complete each task but his scores fell in the deficient range, and are indicative of deficits that would require formal interventions.

Mathematical Computations—

Bobby was administered the math subtests of the WAIS-IV and WRAT-4 to determine his ability to perform calculations as they relate to daily functioning. The WAIS-IV is a clinical instrument utilized to assess cognitive abilities in adults from ages 16 to 90 years old. This subtest was administered to give a quantitative measure of his ability rather than to derive an intelligence quotient (IQ). The math subtest of the WAIS-IV consists of 22 questions that are read aloud and timed. No paper or pencil is given. The items become progressively more difficult. Bobby was able to receive credit for 7 of the 22 items. He demonstrated ability to perform simple addition. His responses yielded a standard score of 4 (mean of subtests is 7 ± 3). This score falls at the 4th percentile and is indicative of moderately impaired ability.

The WRAT-4 is an achievement test that measures the basic academic skills of reading recognition and comprehension, spelling, and arithmetic computation. The WRAT-4 is comprised of four subtests: Word Reading, Sentence Comprehension, Spelling, and Math Computation. The Math Computation subtest measures an individual's ability to perform basic mathematics computations through counting, identifying numbers, solving simple oral problems, and

calculating written mathematics problems. Bobby was able to correctly complete 9 of 40 items. He used scratch paper and has marks to compute his answers. He was able to again complete simple 2-digit addition and subtraction, but stated he never was taught his "times tables" and could not multiply. Additionally, he was unaware of what division was and had difficulty grasping that it was "the opposite of multiplication." He required assistance on word problems, and they had to be read aloud to him. He obtained a standard score of 65 (1st percentile). This score is equivalent to the third grade level of achievement. This score is classified as falling in the moderate to severe range when compared to the normative sample.

Summary/Conceptualization:

Mr. Bobby Moore, a 54-year-old African American male, was born in Coushatta, LA and raised in TX. He is the 4th of 9 children born to his parents. His parents remained married for approximately 57 years despite that fact that his father was physically abusive towards all family members. Academically, Bobby has historically performed behind that of his peers, but does not have a history of behavioral problems in school. Records indicated that he may not have received special services in his classes, and was not formally tested until age 13. However, he stated that he has always had profound difficulties in receptive/ expressive language, and required the assistance of his family for many of functional living tasks. He was retained several times and never passed a grade level passed on performance, despite extra efforts by his family and some teachers. He withdrew from school early in 7th grade. He led a transient life for most of his adolescent years, until being incarcerated. He has never married and has no children. His medical

history is complicated by multiple traumatic brain injuries. Currently, Bobby is incarcerated on charges of Capital Murder.

The current evaluation, including records review and a family interview, was conducted to assess domains of cognitive functioning. It seems that Bobby exhibited developmental and intellectual delays early in his life that were significant enough for him to require consistent monitoring and elicit help from his teachers. These deficits were demonstrated much prior to age 18, which would satisfy criteria for a formal diagnosis of Intellectual and Developmental Disability (IDD), formerly referred to as Mental Retardation. Adaptively, he had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition. Thus, there is historic information that accounts for Bobby's intellectual, developmental, and adaptive deficits; and indicates that he met full criteria for a diagnosis of mental retardation as a child.

Taking into account the records reviewed, prior intelligence test findings, and Bobby's performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for IDD; and this clinician would be justified in assigning said diagnosis. Bobby consistently scored in a deficient range, even when his first formal testing did not occur until he was 13 years old (1973), which is the same time he left school. If tested when deficits were first apparent (approximately 6 years old given he was retained in 1st grade), his intelligence quotient (IQ) would very likely have been below the reported standard score of 70. In 1989, at age 30 and a decade

post, Bobby obtained a full scale IQ of 71. Similar to his score and findings in 1973, this score is deficient and inflated by what adaptive skills and learning he had acquired while incarcerated. More importantly, the latter score did not deviate much from prior scores (which is typical), and suggests that time and experience did not bring about new learning for Bobby. That is, the deficient score may be the maximum "ceiling" for his intellectual capacity. Test results from the current evaluation corroborate such when assessing his capability of learning new information.

Test findings from the current evaluation indicated slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability that cannot be solely attributable to a limited fund of knowledge (i.e., deficits observed on Trails B). These higher-order deficits would likely be key in being able to adapt to one's environment, thinking quickly, and problem-solving. These domains would also be the most difficult to detect from just social contact, and may not come to the attention of others until adulthood. Bobby's severity and characterization of deficits was complicated by head trauma. That is, specific to his case is an impoverished brain that was even more compromised by multiple insults.

12/20/2013

/s/ Shawanda W. Anderson, Ph. D.
Shawanda W. Anderson, Ph. D.
Licensed Psychologist/Neuropsychologist

Date

cc: Mr. Patrick McCann, attorney
Ms. Harriet Smith, attorney
Mr. Tyler Hill, attorney

REPORTER'S RECORD
VOLUME 3 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 3rd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[48] Q. (BY MR. MCCANN) Doctor, what do you do for a [49] living?

A. I'm a neuropsychologist.

Q. What is a neuropsychologist?

A. A neuropsychologist is a clinical psychologist by training that has specialty training in either TBI or some anomaly of the brain.

Q. And "TBI" means traumatic brain injury?

A. Yes. I'm sorry.

Q. Would you mind briefly going over your education and experience for us, please?

A. Sure. My bachelor's degree is from Dillard University in New Orleans, Louisiana; I worked on a master's degree at Northwestern State in Natchitoches, Louisiana; and I received my doctorate in clinical psychology from Jackson State University in Jackson, Mississippi.

Q. And how did you begin to study neuropsychology?

A. I did a two-year—I did a predoctoral internship at the Utah State Hospital in Provo, Utah, and did a two-year postdoc fellow at Mississippi Methodist Rehab Center at Jackson, Mississippi.

Q. So you've had two years of specialized training after your doctorate in neuropsychology?

A. Yes.

Q. Okay. Since then have you been in private practice or any teaching positions?

[50] A. I have been in both.

Q. And where were you teaching?

A. I taught at Prairie View A&M University for four years and from there I worked for the Mental Health Mental Retardation Authority of Harris

County and subsequently from there, went into private practice. I'm still a contract psychologist with MHMRA.

Q. Okay. Have you written any research papers or presented any papers at professional associations in your field?

A. Yes.

Q. And how many times?

A. I think I have 12 articles and maybe 8 presentations.

Q. Okay. What is the primary focus of your experience nowadays? What do you do?

A. Neuropsychology with adolescents, children and the geriatric population.

Q. Okay. And did you come to be involved in this case with Mr. Moore in my office a few months ago at my request?

A. Yes.

Q. Okay. And what did I ask you to do?

A. To conduct an evaluation to determine if there was any organicity and possible traumatic brain injury.

Q. And would you explain what the term "organicity" [51] means?

A. If Mr. Moore was born with any sort of brain anomaly.

Q. And as part of your evaluation, would you go over with the Court what you did to prepare a report for us?

A. Yes. I read documents that were submitted to me, I conducted a five-hour evaluation with Mr. Moore and a two-hour interview with his family.

Q. So you actually went to their home?

A. Yeah, the home of an aunt, his aunt.

Q. And interviewed family members there?

A. Yes.

Q. Okay. And could you go over some of the standard tests that you administered?

A. Sure. I actually have them listed in the order that they were—

Q. That will be fine.

A. The first thing I did was review any records that were available and the records kind of came and went during the evaluation. I did what's called a mini mental status exam, just to make sure that—it's kind of a standard.

Q. Doctor, would you pull the microphone in just a little bit more closely to you.

A. Sure.

Q. And we've talked on the phone before and you have a [52] quick mind and you speak quickly. Would you slow down just a little bit for the court reporter, please?

A. Yes, I will. I said I did—I reviewed the records.

Q. Right.

A. I also did a mini mental status exam. I administered the Rey Complex Figure Test, the Symbol Digit Modalities Test.

Q. Would you spell some of those out if they're unusual words for us, please?

A. Symbol, Digit, just as it sounds. Modalities is M-O-D-A-L-I-T-I-E-S.

Q. Okay.

A. Test. Trails A and B.

Q. And what is the Trails Test?

A. The—would you like me to describe it in detail?

Q. In as Reader's Digest version as one could possibly do.

A. It's two parts. There's an A part and a B part. They are—they do not stand alone. On a standard sheet of paper there are circles with initially numbers in the circles and you are to consecutively connect the circles. They're randomly dispersed among the page. And the examiner, myself, I would time the examinees to see how quickly they could complete that.

[53] Q. Okay. And did you also administer the Hooper Visual Organization Test and the Controlled Oral Word Association Test?

A. I did.

Q. All right. And the California Verbal Learning Test-Edition II?

A. Yes.

Q. And those are tests of both, obviously, visual perception but also verbal perception as well?

A. Yes.

Q. And language skills?

A. Yes.

Q. Okay. Did you administer the Delis-Kaplan Executive Functioning and some subsets of the Wechsler Adult Intelligence and Wide Range Achievement Test?

A. Yes.

Q. Okay. Specifically the math subsets?

A. That is correct.

Q. Okay. Tell us what your findings were in order, if you would not mind, please.

A. Of each test or?

Q. Overall, your findings from the interview and from the test themselves.

A. Okay. The math and the part of the WAIS was administered in a subsequent session, so the initial session [54] was just the neuropsych test or just the ones that you mentioned earlier. What I found is that Mr. Moore's processing speed was slowed, although he had intact memory, and just from observation and speaking with him for about a hour and a half, I noticed that there were some possible deficits in language and processing speed. So, the test actually confirmed that. On formal tests there were also problems with reasoning and judgment. And let me refer to my report here.

Q. Sure.

A. And I think those were the most prominent.

Q. When you say "processing speed," literally that's the speed at which one takes in information, makes a decision about it and then responds?

A. Right. It's how fast your brain thinks.

Q. Okay. Like the chip in my laptop, in that sense?

A. Yes, I guess so.

Q. And the test findings, could you go through those, beginning on page 5 of your report?

A. Okay.

Q. Just in summary, if you would not mind. In terms of cognition, I noticed that we—I did not ask you to do a full IQ test but there were prior IQ tests, correct?

A. Correct.

Q. Okay. On the cognition findings, did you find what [55] appeared to be deficits in his cognition?

A. In the subsequent session or—

Q. In the first interview and some of the others, did you find any deficits?

A. Yes.

Q. Okay. And what were they?

A. In terms of—I'm sorry. In terms of what I read or in terms of what I observed?

Q. What you observed and what you were able to test for.

A. Yes, definitely in terms of what I observed and what I tested—when I test, the neuropsych tests take in a bit of cognition as well. They're not formal IQ tests where there is an IQ derived but there is surely thinking and thought that goes into those tests and because I could see the deficits as I'm administering it and it actually came out that his scores were impoverished and what I saw actually materialized in terms of numbers and on paper.

Q. Would you mind summarizing a few of those scores for us?

A. Sure. Verbal memory, which was the California Verbal Learning Test. It's what they call verbal learning because there's no visual. I don't actually show him a word. I read him 17—16—a list of 16 words and you're supposed to repeat back as many of the words as you can in [56] any order. I actually read that five times and with each trial, the typical person with exposure would get more and more words with each trial. Some people actually get all 16 and you ask them to repeat it again and if they get all 16, you don't administer any more trials.

Mr. Moore's performance was in the low average range, which it's not below average, it's just low average. So of the 16 words, after about 20 minutes, he could remember about 6 of the words. So, what that tells me is what he learned, he actually could hold onto, it just took him several times to actually learn it. So, it's not the retention or the recall or the memory that's impaired; it's the acquisition, it's the brain's capacity to hold onto those 16 words and actually learn them.

Q. Does that go back to the processing speed that you were talking about in some ways? Is it related to that?

A. I think it—in my opinion it speaks to the capacity of the brain to learn.

Q. Okay. Fair enough. And—

A. He could only process as fast as I could—can speak.

Q. Okay. Gotcha.

A. Or slow down.

Q. How was the visual memory?

A. Visual memory was a little bit better. The memory [57] is based on the perception. You actually have to perceive something before you can actually remember it. And his perception was very—was not problematic but he did draw the figure. You have to draw a figure and it's an abstract figure, so I can't say it's a boat or a rocket. It's just something with lines and angles. And he's supposed to recall and actually draw that. He drew it slowly, 412 seconds, which seems like a lot of time but it should probably have been done in about 2- to 300 seconds, so his processing of it is slow because it is abstract. It's a lot of information. But what he did draw, he could remember aspects of it.

THE COURT: I'm sorry. I did not hear the end of your sentence.

THE WITNESS: He could remember aspects of it, I believe is what I said.

Q. (BY MR. MCCANN) Pull that in.

A. Maybe I should just come up.

Q. There you go. And in terms of processing speed, tell us about that.

A. Again, processing speed is how fast the brain fires. And here's where—this is when I saw the most deficits. His processing speed fell in what we call a deficit range, so it's pretty low. In terms of a score, his T score was a 25 that I have listed here, where 50 is the [58] mean and the standard deviation is 10. So, 40 would be low average and then 30 would be low and then he's 25. So he's more than two standard deviations below the mean.

Q. Is there a percentile that that would place him in in terms of most people's processing speed?

A. There is but I need my little chart and cheat sheet to tell you that.

Q. That's all right. I need to look up all the punishment things on a chart, so that's fair.

Looking at this also, would you say that in terms of complex matters there was a test you gave that required completion of 110 items on written responses? Do you recall how many he actually completed?

A. That would probably be the simple digits. 32, according to the report.

Q. Okay. Out of 110?

A. Right, yes.

Q. Okay. And how would that place him in terms of normal folks' scores?

A. It's in the borderline impaired range. And just to qualify, most persons don't finish all 110. There's a time allotted. You have 90 seconds and you do as many as you can in 90 seconds.

Q. Okay. And you had mentioned that Bobby had some problems with verbal fluency and words during his interview. [59] Did you administer that—is it the Word Association Test?

A. I did. That test not only speaks to language but processing as well. It's timed. You're given a letter and you have to think of as many words as you can that begin with that particular letter, so it wasn't the fluency, meaning, say, the back and forth that you and I are having right now, it's just can you come up with them quickly, so it—I didn't give that test specifically

for fluency. It was for—more for processing speed even though it falls under language.

Q. So you say C, I say coffee, crib, car.

A. Exactly.

Q. And within that certain amount of time you score based upon that?

A. Yes, one minute.

Q. Okay. And what about executive functioning? And first tell us what you understand executive functioning to mean.

A. That's a hard definition. Executive functioning is what—Reader's Digest version would be higher order learning, so it's more frontal lobe judgment, reasoning, more abstract thought that comes as you mature and learn more.

Q. Okay. So, it should normally be a factor that would be normed across age and education?

[60] A. Yes.

Q. Okay. And how did he do on those?

A. Not so well.

Q. And I understand this is—you're a kind person but let's be candid here. What was the scoring?

A. All scoring was in the deficient range.

Q. And deficient is where in the scale of scoring?

A. Severe.

Q. So it's—

A. Beyond mild, moderate, severe and profound.

Q. Okay. You also administered some math tests to Bobby.

A. Yes.

Q. And tell us about those.

A. There were two. It was the arithmetic subtest from the WAIS-IV and the arithmetic subtest from the WRAT-4.

Q. Could you spell those out for the court reporter?

A. Yes, I can. I'm sorry. The WAIS is the Wechsler Adult Intelligence Scale and we're now on the fourth edition. It's the most current. And the WRAT is Wide Range Achievement Test, also the fourth edition.

Q. Okay. And the achievement tests measures academic skills whereas the Wechsler, which is I think spelled W-A-I-S-C-H-L-E-R, measures capacity and ability; is that fair, as a difference?

[61] A. The two tests? Yes.

Q. Yes.

A. Okay.

Q. And how were the scores on those?

A. On the WAIS, if I could give it to you in a T score again, his T was 30. And I do have a percentile. That's about the fourth percentile.

Q. And I want to be clear where that percentile is. That's the bottom fourth percentile, correct?

A. Yes.

Q. Okay. In other words, 96 people out of a hundred would have scored higher on that test?

A. If they were given the test 100 times, yes.

Q. Okay. And were there any other findings?

A. Well, with the WRAT?

Q. Yes.

A. The WRAT is different. With the WAIS there is no paper and pencil. The questions are just administered orally. With the WRAT there is paper and pencil and you can use scratch. Both are timed. And his standard score was about a 65. So that's not a T score. That's based on the 100 as the mean with a standard deviation of 15.

Q. Okay. What percent—a standard score of 65 would place him in what percentile?

A. The first. 1.

[62] Q. Again, the bottom first?

A. 1, yes.

Q. So what grade level would that probably be?

A. Third.

Q. Third grade?

A. Third grade.

Q. Okay. Mr. Moore's how old?

A. 56. I'm sorry. I'm not sure.

Q. Born in '59, so it would be 54.

THE DEFENDANT: 54.

THE WITNESS: 54. I'm sorry, Mr. Moore.

Q. (BY MR. MCCANN) Very well. And you also conducted some interviews with the family?

A. I did.

Q. Okay. And just, if you could, summarize those findings for us, if you would not mind.

A. Okay. There were several family members present and the purpose—my purpose for being there was to see if there were developmental issues, if any deficits were longstanding and chronic and what I learned from the family was that they, in fact, were, that these deficits had been seen in some form or another and reported by the school early on. And the family gave me more actuarial data, things like, you know, we never left Bobby alone and we had to hold his hand to do this and I helped him with homework. [63] So, that was the kind of information that I got from—there was an aunt, a cousin, several brothers and sisters, who all corroborated that information.

Q. Okay. So, and I just want to be sure I'm getting this in an accurate picture. You interviewed and tested Mr. Moore?

A. Yes.

Q. You went to his family's home and interviewed his family?

A. Correct.

Q. And you reviewed a number of other records, school, academic, medical, that we had submitted to you.

A. Correct.

Q. Okay. Originally I had asked you to examine him for organic problems in his brain. Have you done determinations of mental retardation in your practice?

A. I have.

Q. Have you done them few or many times?

A. I would say more few.

Q. Okay. And you do handle children and teenagers and people below the age of 18?

A. Correct.

Q. In your practice?

A. Yes.

Q. Okay. And you have been asked to make [64] determinations for them; is that correct?

A. Correct.

Q. Okay. And in your practice I asked you, after you came back with the initial findings, I asked you to review the criteria for determination of mental retardation, did I not?

A. Yes, you did.

Q. And in your opinion, would Bobby Moore meet the criteria for mental retardation?

A. Yes.

Q. Okay. And that would be true whether one was using the DSM-IV; is that fair?

A. Yes.

Q. Or the—formerly the American Association for the Mentally Retarded, now the American Association for—I'm sorry; I always get this wrong—Intellectual Disability and Developmental Disorders?

A. Correct.

Q. Okay. And whether one used those criteria or the DSM's, Mr. Moore would meet that criteria?

A. Correct.

Q. Do you have any hesitation about stating that he would meet those criteria? In other words, do you

feel that he didn't give you a good effort on his tests at all?

A. No.

[65] Q. Okay.

A. No, I mean, and I have no reservations about saying that. I think he gave great effort.

Q. Okay. And how long have you been giving these tests?

A. For ten years.

Q. Okay. And that's in both your teaching and your private practice?

A. Yes.

Q. Okay. And you gave—did you assist in giving those tests when you were getting your doctorate as well?

A. Yes.

Q. Okay. So, you actually have—you have more than ten years' experience doing this but as the chief boss, you have ten?

A. I give these tests every day of my life and I have since 1998.

Q. Okay. Fair enough. Thank you.

* * *

Q. (BY MR. PEEBLES) Good morning, Dr. Anderson.

A. Good morning.

Q. But we do have to be fair and say that you did not [66] ever administer a full-scale standardized IQ test, correct?

A. I did not.

* * *

[68] Q. Mr. McCann had asked you or indicated that he first hired you to examine Mr. Moore for organic brain disorders.

A. Correct.

Q. Right? And then when the results of your testing came back, he asked you to go and look into what the AAIDD qualifications for mental retardation are and then evaluate him for that, right?

A. No.

Q. I misunderstood?

A. Correct.

Q. Okay. Then he originally hired you for organic brain disorder?

A. Correct.

Q. And then how did you go from that to mental retardation?

A. I presented the results to Mr. McCann and his team.

Q. Uh-huh.

[69] A. And I'm familiar with the requirements for MR/IDD and there was no subsequent evaluation from that point except with his family.

Q. So, you evaluated your existing data to see if it fell within what you felt was a diagnosis for mental retardation?

A. Correct.

Q. So at that time you were administering these tests, you were not administering the tests with an eye for evaluating him for mental retardation.

A. Correct.

* * *

[70] Q. What about depression? Is that something that could lower scores?

A. Sure.

Q. What about somebody who has a specter of facing the death penalty? Could that lower scores?

A. I'm not sure.

Q. You've come across people that have lied to you in order to achieve what they think is their own personal benefit, right?

A. Sure.

Q. Because that's shading the way they're responding [71] in a manner to achieve a particular result which would benefit them, right?

A. Correct.

Q. Okay. And certainly a lower test score on these tests in this context, for someone facing the death penalty, that might be a motivator. We can agree on that, right?

A. Yes.

* * *

[74] Q. You referenced some materials that were given to you by the defense that you reviewed prior to interviewing the family members and Mr. Moore. Did those materials include any of the record, court record from this trial?

A. None.

Q. So where did you get your understanding of what Mr. Moore was convicted of?

A. I read reports on the prior IQ test.

* * *

[76] Q. (BY MR. MCCANN) Physical abilities can coexist with intellectual disabilities, can't they?

A. Of course, yes.

[77] Q. Somebody can be fit and physically well-coordinated while still having some form of mental impairment; is that a fair statement?

A. Yes.

Q. And the ability to swim or to play a game such as pool that involves physical dexterity, those can coexist in someone who has mental impairment still, can they not?

A. Correct.

Q. Okay. In the same way someone can be athletic but perhaps not terribly bright or the opposite, very, very bright and terrible athletically?

A. Agreed, yes.

Q. Okay. And in terms of your examination of the family—

A. Uh-huh.

Q. Did you—I hesitate to ask this but you've dealt with many families who had reasons for giving you slanted information; is that fair?

A. Yes.

Q. Whether to cover up a perceived deficit in a child or to, for some reason, in a dispute about what the child's actual deficit is, perhaps out of parental pride, whole host of reasons, but families don't always tell you the truth; is that fair?

A. That's fair, correct.

[78] Q. Okay. You spent a couple hours with Mr. Moore's family; is that correct?

A. Yes.

Q. Did you get any sense that they were shading information to you in any way?

A. No.

Q. In fact, some of their discussions, if I recall your description, they were emotionally painful to recount; is that fair?

A. That's fair, yes.

Q. Okay. And in terms of the Polunsky Unit, the death row unit that you went to—

A. Yes.

Q. —certainly not a place that most people would consider uplifting.

A. No.

Q. Okay. But at the same time if you have been in such an environment for three decades, is it reasonable to assume that even difficult environments, that people can adapt to them?

A. Yes.

Q. And that although an environment may be difficult, that someone can endure that and still present properly in a testing situation such as this?

A. Yes.

[79] Q. Okay. And regarding practice effect, and I realize I did not ask you to review any literature on that prior to coming up, but since you often deal with people who have suffered traumatic brain injury, such

as car accidents or returning veterans, practice effect is not necessarily something you run into in your practice much, is it?

A. No.

Q. Thank you.

* * *

[81] Q. (BY MR. MCCANN) In terms of writing or reading, somebody can obviously have a physical impairment that prevents them from writing while they can read an instruction; is that fair?

A. Correct.

Q. And someone could have an organic brain disorder that would prevent them having a control sufficient to write by hand but still be able to read a written word on a piece of paper; is that fair?

A. Correct. And I think when you—when the courtroom is thinking of writing, they're thinking of spelling and he had to write for me, not spell for me, and you can write without spelling.

Q. Okay.

A. And reading.

Q. Is that because you can copy a visual image?

A. Yes.

Q. Just like I would copy a drawing of a cat?

[82] A. Correct.

Q. Or a circle?

A. Correct.

Q. Okay. And I do want to—this would be my last one on this and I appreciate your time today. It is

possible for people with either mental retardation or organic damage to their brains to improve some skills such as reading and writing, isn't it?

A. Yes.

Q. Thank you.

* * *

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EDUCATION:

Jackson State University
Jackson, MS 39217
Ph.D., Clinical Psychology
08/97 - 05/04

Northwestern State University
Natchitoches, LA 71497
M.S., Clinical Psychology
08/94 - 08/97 (hrs. toward Ph. D.)

Dillard University
New Orleans, LA 70122
B.A., Psychology (cum laude)
08/89 - 05/93

EMPLOYMENT/EXPERIENCE:

Walden University, Minneapolis, MN
04/09 to present
Distance education lecture development and administration to graduate students pursuing doctoral degrees in Clinical Psychology. Records, grades, and office hours maintenance. Biannual travel for practica supervision and on-site clinical training. Thesis and dissertation mentoring, editing, and chairperson duties. Coursework based on quarter sessions.

Neuropsychological Associates, Houston, TX 77065
Private Practice
12/06 present

Neuropsychological evaluations, dementia ratings, school/university consultation, consultant and evaluator with the Neuropsychiatric Center. Providing individualized services, assessment, and psychotherapy to survivors of TBI, stroke, and other brain injuries. Referral source for local neurologists, school psychologists, psychiatrists, and other paraprofessionals.
www.neuropsych-associates.com

Research Consultation Pros, New York City, NY
Research Consultant
04/08 - present (on hiatus)

Independent research consultant with an on-line contracting agency that provides expertise in research methods and design, statistical procedures, APA style formatting. Assistance and guidance for completion of written assignments, Master's theses, and doctoral dissertations are also provided.

Mental Health/Mental Retardation Authority of Harris County, Houston, TX 77074
Clinical Psychologist VI-Specialized Therapies and Rehabilitative Services Clinic
06/07 - present

Primary duties include providing outpatient clinical services to children, adolescents, and young adults with Axis II diagnoses. Other duties are monthly presentations to the psychological staff (MR division) on ethical concerns and issues, affiliation with local teaching institutions (adjunct), and demonstrated research through formal presentations and publications. Behavioral support, treatment planning, family

therapy, Adaptive Behavior Analysis (ABA), supplemental neuropsychological assessments, differential diagnosis, and psychological evaluations are also included in secondary duties. Appointment to the 4-digit Fetal Alcohol Spectrum Disorders Assessment Team, and case management of consumers with brain injury (TBI), organic disorders, and those that are neurologically complex.

Adjunct Professor, Houston, TX 77064
06/07 - present

Serving as adjunct professor for several universities within the metro-Houston area (Texas Southern University, Houston Baptist University, and Houston Community College). Adjunct duties include teaching various graduate and undergraduate courses within the discipline of Psychology. Records maintenance and office hours held and coincide with number of courses taught. Courses, to date, include Physiological Psychology, Statistics I, and General Psychology. Adjunct duties are also for virtual, distance and/or asynchronous learning institutions. Specifically, Capella University and Walden University.

Prairie View A & M University,
Prairie View, TX 77446
Assistant Professor/Training Director
Graduate Department of Psychology
08/04 - 06/07

Served as Director of Clinical Training of the doctoral program in Clinical Adolescent Psychology. Responsible for implementing, documenting, and supervising clinical training experiences for doctoral students in the Clinical Adolescent Psychology Program. Additional duties include development of the program handbook, scheduling and coordination of oral and

written comprehensive exams, liaison between program and CUDCP, lecture and instruction of undergraduate and graduate classes in specialties of Psychology. Developed on-line and web enhanced classes for undergraduate studies. Classes taught: [Undergraduate] General Psychology, Physiological Psychology, Clinical Psychology, Statistics I, Senior Thesis; [Graduate] Cognitive Psychology, Neuropsychology, Testing & Assessment, Personality, Psychopathology, Psychotherapy, Practicum and Field Placement.

Methodist Rehabilitation Center,
Jackson, MS 39216
Post-doctoral Training Fellowship
08/02 - 08/04

2-year, APPCN accredited, postdoctoral fellowship in Clinical Neuropsychology. First year inpatient rotation with primarily TBI and stroke survivors. NIDRR funded National TBI Model Systems Grant data collection. Neuropsychological evaluation of acute and post-rehabilitation patients. Second year entailed community reintegration of brain injury survivors, group therapy, individual outpatient therapy, and family conferences.

Utah State Hospital, Provo, UT 84601
Predoctoral Internship
07/01 - 07/02

1-year, APA accredited, predoctoral internship in Developmental Neuropsychology. 6-month rotations on Youth & Children's Unit and Adult Unit. Additional training in Forensics, neuropsychological assessment, and differential diagnosis. Individual therapy, including cognitive remediation and music therapy. Research projects on OCD, Landau-Kleffner

Syndrome, severe and persistent mental illness, and test development of memory assessment.

Methodist Rehabilitation Center,
Jackson, MS 39217
Practicum/Externship Student
12/99 - 12/00

Assisted with National TBI Model Systems data collection and coding, development of the MS Aphasia Screen Test, non-Model Systems data collections. Neuropsychological evaluations and outpatient therapy with brain injury survivors. Required for fulfillment of doctoral degree coursework.

Oakley Training School, Raymond, MS 39154
Youth Services Counselor I
8/99 - 5/00

Conducted group and individual therapeutic sessions with 25 juvenile offenders in a med./max. security unit. Administered personality, achievement, and intellectual assessments. Wrote and developed treatment plans, parole notifications and updates. Arranged transitional placement for released offenders. Participated in the disciplinary committee. Maintained documentation and records and acted as a general advocate for the cadets. 1200 hours were towards Externship

MS Baptist Medical Center,
Jackson, MS 39203
Practicum Student
05/98 - 08/99

Worked with Life Enrichment Services. Major duties included intellectual, personality, and achievement assessment of dually-diagnosed adult and adolescent inpatient populations. Required for fulfillment of doctoral degree coursework.

Hinds County Human Resource Agency,
Jackson, MS 39203
Co-Director
8/97 8/99

Position funded by AmeriCorps/Corporation for National Service. Planned, coordinated, and scheduled after school activities for 29 "at-risk" youth. Devised monthly budgets, employee scheduling, volunteer recruitment, intellectual and achievement assessment, and supervised 2 other employees: Goals of the program were to improve academic performance of the youth, while building self-esteem and community awareness.

Jackson State University, Jackson, MS 39217
Teaching/Graduate Assistant
Department of Psychology
8/97 12/00

Responsibilities included lecturing, constructing exams, keeping conference hours, reporting and recording grades for undergraduates enrolled in General Psychology.

Housing Authority of the City of Shreveport,
Shreveport, LA 71101
Community Services Coordinator
3/97 - 8/97

Duties included, writing and renewing federal grants to receive supplemental funding of coordinated educational, self-improvement programs/activities for public housing residents (i.e., GED programs, family self-sufficiency programs, self-esteem seminars, Welfare-to-Work training, etc.), and administration of surveys to assess needs and concerns of the residents. Secured $1.8 million from Housing and Urban Development

(HUD), in conjunction with The Salvation Army and other homeless shelters in the Metro area.

Northwestern State University,
Natchitoches, LA 71497
Graduate Assistant
8/94 - 5/96
Department of Psychology

Tutored and graded exams for undergraduate classes in statistics. Lectured in General Psychology. Observed and graded clinical interviews of graduate students enrolled in the Master's program. Coordinated and taught Personality Assessment (PSY 576, MMPI-2 and projective techniques).

Articles/Peer-reviewed Manuscripts for Publication:

Anderson, S. W. & Jackson, C. R. (2009). Differential diagnoses and treatment of behavioral disturbances associated with Landau-Kleffner Syndrome: The case of T. R. *Clinical Case Studies, 8(1),* 14-24.

Anderson, S. W., Sutton, M. J., Brown, K. L., & Francis, N. (2008). Assessment of older driver abilities: The negative impact of anxiety on risk-taking behaviors. Manuscript submitted for publication *in Anxiety, Stress, & Coping.*

Wilson, D. E., Foster, J. & Anderson, S. W. (2009). Racial socialization's moderating effect between poverty stress and psychological symptoms for African American youth. *Journal of Black Psychology, 35(1), 102-124.*

Anderson, S. W., & Moore, P. A. (2009). The impact of education and school-based counseling on children and adolescents' views of substance abuse. *Journal of Child and Adolescent Substance Abuse, 18(1),* 16-23. Research funded by Career Development

Mini-grant provided by the Texas Juvenile Crime Prevention Center and the PVAMU College of Juvenile Justice & Psychology.

Anderson, S. W., Sly, K., Hart, K., & Alexander, K. (2008). Differentiating between chronic and nonchronic juvenile offenders using the MMPI-A. Manuscript submitted for publication in *Journal of Offender Rehabilitation (revisions pending).*

Anderson, S. & Booker, M. (2006). Cognitive Behavioral Therapy versus psychosurgery for a refractory case of Obsessive Compulsive Disorder. *Journal of Neuropsychiatry and Clinical Neurosciences, 18(1),* 129.

Anderson, S. W., Gontkovsky, S. G., Sherer, M., Nakase-Thompson, R., High, W., & Sander, A. (2004). The effects of intrastate location on treatment compliance for TBI survivors. *Journal of Cognitive Remediation, 22(4),* 6-10.

Anderson, S. W (2004, November). Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions: Implications for institutions. *Journal of African Studies.* University of Houston: Houston, TX.

Anderson, S. W. (2004). *Differentiating between chronic and nonchronic juvenile offenders using the MMPI-A.* Doctoral dissertation. ProQuest, Social Sciences, #3148763. ISBN: 0496081098

Anderson, S. W., Crist, A. J., & Payne, N. (2004). Predicting inpatient length of stay using the Brief Psychiatric Rating Scale-Expanded. *Psychiatric Services,* 55(1), 77-79.

Presentations at Scientific Meetings:

Anderson, S. W. (2007, March). *The Impact of Education and School-Based Counseling on Children and Adolescents' Views of Substance Abuse.* Paper and poster presented at the 9th Annual Lonnie E. Mitchell National HBCU Substance Abuse and Mental Health Conference, Washington, DC.

Anderson, S. W. (2006, April). *A Glimpse into the Academic Achievement Testing of African American Children.* Paper presented at the 1st Biannual African American National Conference: The Black Scholar and the State of Black America, Michigan State University, East Lansing, MI.

Moore, P. A. & Anderson, S. W. (2005, August) *Posttraumatic Stress Disorder in Children: An examination of the treatment modalities and proposed African-centered treatment paradigms.* Paper presented at the 37th Annual International Convention of the Association of Black Psychologists, South Beach, FL.

Anderson, S. & Moore P. (2005, February). *Chronic juvenile offending and the MMPI-A.* Paper presented at the 32nd Annual Meeting of the Western Society of Criminology, Honolulu, HI.

Williams, S. & Crist, A. J. (2002, October). *Predicting inpatient length of stay using the Brief Psychiatric Rating Scale-Expanded.* Poster presented at the 110th Annual Meeting of the American Psychological Association, Chicago, Illinois.

Williams, S. (2001, September). *Treating Refractory Obsessive-Compulsive Disorder.* In-service staff training for Adult Services of the Utah State Hospital, Provo, Utah.

Williams, S. (1999, June). *Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions: Implications for Institutions.* Poster presentation at the 12th Annual Meeting of the American Psychological Society, Denver, CO.

Williams, S. (1997, October). *Self-esteem and racial identity of African American students attending predominantly white versus historically black institutions.* Paper presented at the 49th Annual Meeting of the Louisiana Psychological Association, Baton Rouge, LA.

Williams, S. (1994, December). *What is known about Schizophreniform.* Paper presented at Northwestern State University, Fall 1994 Research Day:

Williams, S. (1993, October). *How much and when should a therapist disclose: A review of the literature.* Paper presented at the Dillard University Senior Seminar on Ethical Concerns.

Williams, S. (1993, April). *Children reared by single parents.* Paper presented at Dillard University, Spring 1993 Research Day.

Williams, S. (1992, May). *The influence of list length on the amount of recall* (Senior research project, independent study). Paper presented to the Dillard University School of Education.

Williams, S. (1992, May). *Determining point of subjective equality using the Muller-Lyer Illusion.* Paper presented at Dillard University, Spring 1992 Research Day.

Williams, S. & Frank, L. (1992, February). *Motivation, the organization of action: Obsessions and compulsions.* Paper presented at Dillard University, Spring 1992 Research Day.

Williams, S. (1991, September). *Factors that interfere with memory-why we forget.* Paper presented at Dillard University, Fall 1991 Research Day.

Grants, Honors and Awards:

- Credentialing Scholarship from the National Register of Health Service Providers in Psychology, 2008
- $1,000 mini-grant from Texas A & M University System/Disability Training Network; Spring, 2007
- $20,000 professional development grant from COJJP, PVAMU; Fall, 2004
- National Science Foundation/Association of Institutional Research Summer Fellowship; July, 1999
- American Psychological Society Travel Award; June, 1999
- $1.8 million housing grant from HUD c/o The City of Shreveport Housing Authority; 1997
- Jackson State University Graduate School Scholarship/Assistantship; August, 1997-2000
- National Service Corporation Educational Award/Scholarship; August, 1997-1998
- Northwestern State University Academic Scholarship/Assistantship; August, 1994-1996
- Psi Chi Honor Society; Fall, 1992

- Dillard University Biology Achievement Award; Spring, 1991
- Dillard University Mathematics Achievement Award; Spring 1990
- Dillard University Academic Scholarship; August, 1989-May, 1993

Affiliations/Licenses:

- Licensed Psychologist (TX License #33380)
- National Register of Health Service Providers in Psychology credentialed (#52173)
- National Academy of Neuropsychology, 2001
- Association of Black Psychologists, 2000
- Association for Institutional Research, 1999
- American Psychological Association, 1998
- American Psychological Society, 1998
- AmeriCorps National Service Volunteer, 1997
- Psi Chi Honor Society, 1992
- Licensed Psychometrist (MS #169236), 2000-2005

Paid or Volunteer Experiences Related to Interest in Mental Health Research:

- Counselor for Katrina survivors, funded by Goodwill Industries and Bethel's Place, 2007
- Committee Member for the PVAMU Institutional Animal Care and Utilization Committee, 20062007
- Editorial Board/Reviewer for *Scientific Journals* International, 2006 to present
- PVAMU National Depression Screening Day Chairperson, October, 2005-2007

- Faculty Fellow for University College, PVAMU, Spring 2005-2007
- Peer reviewer for *Knowledge and Best Practices in* Criminal *Justice & Psychology,* published by the PVAMU COJJP, 2005.
- Peer reviewer for *Psychiatric Services,* published by the American Psychiatric Association, 2003
- Data collection for Wechsler Intelligence Scale for Children- 4th edition (PI project); 2002
- Completed Red Cross Disaster Training for Mental Health Workers; worked 9 hours with 2002 Winter Olympics
- Volunteer Judge for the Mississippi Science and Engineering Fair; March, 1998
- Volunteer Program Director of the Mary. C. Jones after-school mentor/tutoring program supported by Hinds County Human Resource Agency/Metro Jackson Service Coalition; August, 1998-2002
- Volunteer Test Administrator of the Iowa Test of Basic Skills (ITBS) for Operation Shoestring's Project Reading 'n' Ready (developed to improve academic achievement and self-esteem of impoverished children), Jackson, MS. Supported, in part, by United Way; August, 1997-August, 1998
- Volunteer with the National Service Corporation, Washington, DC; August, 1997-2002
- Participated and represented Shreveport Housing Authority in a violence prevention campaign for juveniles at Bossier Parish Community College; July, 1997
- Participated in the Dillard University, McDonough 28 Middle School consortium. Counseled "at-risk"

youth enrolled at McDonough 28, conducted round-table forums, wrote and performed skits pertaining to problem-solving strategies; August, 1992-May, 1993

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REPORTER'S RECORD
VOLUME 2 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 2nd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[181] Q. (BY MR. MCCANN) Dr. Greenspan, if you would, would you tell the Court what you do for a living, please?

A. Excuse me. I'm a retired professor from the University of Connecticut where I was professor of

educational psychology; and I have a clinical appointment at the University of Colorado, where I live now, in the department of psychiatry; and I also have a consulting [182] practice around mental retardation and particularly in forensic settings such as this.

Q. Would you mind going over some of your educational background with us, please?

A. I have a PhD in developmental psychology from the University of Rochester and a postdoctoral fellowship in mental retardation and developmental disabilities from UCLA Neuropsychiatric Institute in the medical school there.

Q. Could you go over some of your research and publications?

A. Yes. I've had a number of appointments, University of Nebraska, Vanderbilt University, where I was a research scientist in one of the federally-funded mental retardation research centers and I have published quite a bit in the area of mental retardation, particularly around diagnostic issues including in an Atkins setting.

* * *

[186] Q. (BY MR. MCCANN) That's fine. Going to this then, as I understand you, the move has been gradually away from rigid IQ scores to IQ scores being a factor or indicator of potential intellectual disability; is that fair?

A. Yes. In fact, in DSM-V, it says neuropsychological measures such as executive functioning are as important or [187] maybe even more important.

Q. Okay. So measures such as Dr. Borda's, you know, somewhat cutely named but still valid Tinkertoy Test, as a measure of executive function, is a good indicator of problems with that?

A. For sure, yes.

* * *

Q. Okay. In going through for consulting on this [188] case, when you're looking through this, what are the things that you try—what's your approach in when you examine a, I suppose, client or subject would be the word, or case file, when you examine those things, what are your methodology? How do you approach this?

A. Well, I put great weight on percipient statements of people, such as the ones who testified today. I place great weight on the fact that people may have described him as slow or stupid or retarded, whatever the word might be, at an early age, which is something that I know the Texas supreme—high court has indicated is important. I look at test scores, look at consistency across test scores and certainly there's a great deal of consistency here.

* * *

Q. That would be fine. If you can, just quickly bring them out because I want to talk about—and I'll frame the question while you're looking for it—the Slosson test, that was the first test that he was given, was a 57, okay. Do you know or can you tell us much about the origins of that test?

[189] A. Well, I've given it. It's since been upgraded. It's not the greatest test. It's more of a screening test. The—as an old test, they use what's called the ratio method, which Dr. Borda described, that is mental

age, which is basically the average score that people of different ages, in this case, children of different ages receive the mean score, they convert that to a mental age. Then you take the person's chronological age, divide the mental age by the chronological age and multiply by a hundred.

It's not the most reliable approach, particularly with adults, because chronological age keeps going up, even though mental age might not that much. But it certainly, as a screening measure, has some validity and certainly validates the concerns that teachers and others obviously had or they wouldn't have had such a test. And I know it's an individually-administered test because I've given it.

* * *

[190] Q. Okay. Looking at the Wechsler or Wechsler, however one wants to say that test, do you believe that those are good, sensible, valid tests?

A. Well, the Wechsler scale is today considered the gold standard. It's the test that's most wildly given by psychologists and neuropsychologists and it's the one that's most relied upon in high stakes settings, such as a court case.

* * *

[194] Q. And looking at that, is it important to understand that people can get an incomplete picture from one area of competence in regards to someone having MR? Is that fair, that someone can be perceived to be competent in one area and thus people without experience in the field might extrapolate that, thus, he cannot be retarded?

A. Well, I mean, the biggest problem in diagnosing MR—and it's particularly a problem in forensic

settings—is the persistence of stereotypes, layperson [195] stereotypes. So, when we think of intellectual disability, we think of Mickey Rooney in the TV show running a coffee stand at the University of Iowa or Sean Penn in a movie about a man who's a parent and for the most part, they have very primitive speech and they—you could just look at them and know they have intellectual disability from their look or their behavior.

For the most part, people with mild mental retardation look normal and they can carry on a conversation. And I was on a board of an ARC agency in Connecticut and I used to go to board meetings and there was one guy, I thought he was a staff member. After a while, it took me about six months to figure out he was actually a client because he had such good superficial social skills. When you get to know him a little better, you realize that he keeps repeating the same story over and over and that his limitations are pretty significant but I wouldn't have known that right away.

A lot of experts, a lot of laypeople, correctional people who are basically laypeople when it comes to intellectual disability, you know, they look at whether somebody is pleasant, doesn't give them trouble, and they can assume the person is much more competent than he really is.

* * *

[200] Q. Okay. In looking at this, have you had a chance to review any other IQ tests that were administered perhaps recently?

A. I saw one today from—

Q. Okay. And what was that IQ score?

A. I'm sorry. I'm very bad with names but—

MR. PEEBLES: Dr. Compton.

THE WITNESS: I'm sorry?

MR. PEEBLES: Dr. Compton.

THE WITNESS: Dr. Compton. I apologize.

A. That was the WAIS-IV, which is the current gold standard that was revised a few years ago.

Q. (BY MR. MCCANN) And what was the raw score on that?

A. Well, what's relevant is the standard score. I believe it was 59 and she did a Flynn correction which [201] brought it down to 57, which is very low, but it's almost identical to the Slosson that was given when he was 13.

Q. So, within those two ranges they're actually consistent?

A. Yes.

* * *

[211] Q. (BY MR. MCCANN) Doctor, what's the most difficult thing that you have found to overcome in terms of both lay and legal misperceptions about mental retardation?

A. Well, there's a tendency to cherry-pick particular behaviors and say, well, in my opinion, somebody with mental retardation can't do that but there was actually a study by the U.S. Department of Education, it's called the National Transition Study, where they followed people ten years after they came out of special education and people with various labels, not just intellectual disability, but that was one of the subgroups, and what they found was that whatever the adult role might be, a significant percentage of

people who would have been labeled intellectually disabled in school were playing those roles, driving a car, holding a job, getting married, whatever the case might be. You can find a significant percentage of people with intellectual disability playing those roles. And that's a very difficult conception or belief to get over because the average person [212] thinks he can recognize intellectual disability when he sees it and that's just not typically the case.

* * *

A. No, I don't believe so.

Q. Well, have you read the transcript of Mr. Moore's first jury trial?

A. No, I have not.

Q. Have you read the transcript of Mr. Moore's second jury trial?

A. I don't believe so.

Q. Are you familiar with the underlying facts of this case?

[213] A. Yes, generally.

Q. What is your general understanding of the facts of the case?

A. My understanding is that there was a store, either a grocery store or some kind of retail establishment, and Mr. Moore was one of two or perhaps three people who held up the store. He was holding a shotgun on a gentleman who was in the service area, the shotgun went off and he killed him and then he ran out.

Q. Are you familiar with whether Mr. Moore talked to the police after his arrest?

A. Well, based on what I've heard today, the answer would be yes.

Q. Prior to today, when you were formulating your conclusions that you've testified to today, you were not aware of whether he'd talked to the police or what he said?

A. Well, I just want to clarify that I'm not diagnosing Mr. Moore and I—my primary role in this case, as I understand it, is to be a teaching expert, talking about what intellectual disability is.

Q. To enlighten us?

A. I'm sorry?

Q. To enlighten us?

A. Yes.

Q. And that's fair. And I think it's also fair for us [214] to admit that nobody can diagnose someone as MR or ID without having themselves done a full battery of tests. Would you agree?

A. I wouldn't—I would agree partially. I think it's improper to diagnose somebody without having spent some time with him or her, which is why I refuse to give a diagnosis here, but I think it's possible, if one meets the individual and does some clinical work, to make a diagnosis by integrating that information with other information.

Q. Are you familiar with whether anyone diagnosed Mr. Moore with mental retardation in his developmental years?

A. No.

Q. You're not familiar or to your knowledge no one did?

A. I know that mental retardation came up as a topic. I don't believe he was ever diagnosed as such.

Q. Well, and when you say it "came up as a topic," the materials that you reviewed said that some of his very early teachers suspected from his—that he was quiet, he was nonresponsive, they suspected, well, we don't know if he's mentally retarded or if he has a learning disability or what it is but we think that it's just that he hasn't been taught, right? They essentially suspected maybe it was mental retardation but then they said, no, we don't think it [215] is. Is that fair?

A. I really can't say as to what they thought.

Q. Okay. But based on what you read, didn't it say, Suspected possible mental retardation but we don't believe—

A. Well, a teacher is not competent to make that diagnosis one way or the other.

Q. Well, and that wasn't really my question whether they were competent to make the diagnosis. My question was: Isn't that what the documents said, that you reviewed?

A. Yes, more or less.

Q. When we talk about measures of executive functioning, I guess we're talking about the ability to exert adaptive behaviors?

A. Not really. It can obviously shed light on adaptive behaviors but adaptive behavior really has to do with how one functions in the world. Executive functioning is more of a cognitive measure that specifically gets at certain underlying reasoning skills that obviously have great relevancy to adaptive functioning but they're not the same thing.

Q. So then if we assume, like from Mr. McCann's questions, the commissary slips, I think the questions were, as a learned, repeated behavior over years and years and years, somebody's going to be able to adapt and do that even [216] if they're mentally retarded, but their executive functioning would appear to be intact, right?

A. Everything is context-dependent. There's no—that one—there's not one skill you can think of where you can't find 3-year-olds doing it. When we talk about executive functioning, we're for the most part talking about more complex behaviors and—that are novel, that require some degree of judgment. So, when you're talking about filling out a commissary form, it's not novel and it really makes very minimal demands on judgment.

Q. When you say that there's not one skill that we would find that we can't find a 3-year-old that will do it, can you contrast that with your statement that you have found no evidence at all to suggest that Mr. Moore is anything other than deficient in every single one of these areas?

MR. MCCANN: Objection. I think that's a mischaracterization of my witness' prior testimony. Could we—is there a read back, possibly?

THE COURT: Maybe—

MR. PEEBLES: Read back is not necessary. I'll rephrase my question.

THE COURT: Yeah. I mean, he can tell us what he said.

MR. MCCANN: Fair enough.

[217] Q. (BY MR. PEEBLES) You were asked questions about these different areas of adaptive

skills. There used to be nine or ten, I think, and now you said there's three?

A. Well, I know you don't want me to give you a lecture but originally it was 9, it turned into 10 and eventually it morphed into 11.

Q. All right. With respect to those, I think your testimony was that there's no evidence here in your mind to suggest that he's anything other than deficient in every one of those areas?

A. That may have been an overstatement. I acknowledge that.

Q. Because we could find a 3-year-old that could do any task if we looked hard enough, right?

A. Yeah, that's one of the problems with taking isolated behaviors because we don't have a normative context for that behavior. Even holding up a store, we don't really know what the normative developmental progression is for pulling a trigger on a shotgun, especially when it may have gone off accidentally.

Q. Well, let's talk about that because do you think there was a chance in this case that it may have gone off accidentally?

MR. MCCANN: Objection. I'm sorry. I don't offer this expert as a gunsmith or some kind of ballistics [218] person. How would he know?

MR. PEEBLES: But this witness just opened the door to this question.

THE COURT: Go ahead and answer it if you can.

A. Well, I know it's an issue that was raised. There was some discussion of the two triggers. The right one had a pull level that was just above the threshold for accident; the left one was higher. But the right one was

the one that went off. I know it has—it was argued by the defense in some earlier documents that I saw that there was a possibility that it was an accident. Be that as—I'm not saying that it was an accident but—

Q. (BY MR. PEEBLES) And in fact, the firearms expert testified that it would never have been an accident with a 3.75 to 4-pound trigger pull. What I'm interested, though, is you just said it was just above the threshold pull for an accidental discharge and I hadn't heard about that. Where did you find that information?

A. I was given a document, 200 or so pages, with all the different pleadings and that was one of the things that came out in there.

Q. You testified a little bit about something and I didn't quite follow what you were saying. This was around the cloak of competence area and you talked about someone who's thinking about committing a crime. Do you remember [219] what you said?

A. No.

Q. Do you remember what that was about?

A. Could you rephrase that? I'm not quite sure I know what you're asking me.

Q. You talked about how someone who is mentally retarded, let's say, using the old language, would consider committing a crime a little differently than someone who was not mentally retarded, at least that was the gist I got. So, can you expand on that a little bit?

A. Yes. I'm almost quoting from the Atkins—the U.S. Supreme Court Atkins decision, a moral culpability in people with intellectual disability is lessened because of their inability to reflect and also

to—because of their gullibility, because they're often—they lack the ability to—the relative ability. It's not absolute, obviously.

Q. So, gullibility is sort of like suggestibility?

A. I would say suggestibility is one of the things that contributes to gullibility, yes.

Q. Okay. And that would, I guess, imply that someone with MR is kind of led into committing crimes by other people. They're gulled into it, lack of a better word?

A. I think they're much more likely to get involved in a criminal sequence of behaviors without fully understanding what's going on or without really being able to reflect on [220] the possible consequences of that behavior.

Q. What if the person had been to prison before and now they're being gulled into another one? Can't they reflect on the consequences at that point?

A. Well, I mean, people who have had some prison experiences, they become a little more street smart, for example, knowing not to—perhaps becoming less trusting of interrogating police officers, for example. But one of the hallmarks of the gullibility of people with intellectual disabilities is they keep making the same mistake over and over again. They don't learn from their mistakes. They don't learn from the consequences.

Q. Okay.

A. And when it's a situation where they're being pressured by someone else, whatever the level of pressure might be, they're more likely to go along with it.

Q. What if the crimes that sent him to prison the first time were not the result of being pressured into a crime with other people; they were actually independent choices and that person was the only one there and the only person that committed the crime?

MR. MCCANN: I'm sorry, Your Honor. I think we're far afield on relevancy here at this point.

MR. PEEBLES: Judge, I can show the relevance because the documents that are in evidence show that when [221] Mr. Moore was evaluated at TDC upon his arrival and they asked him about the previous crimes, he told them exactly what he did. They were all committed by himself: Two burglaries of a habitation, one in the front door, one in the back door; and then he approached some kid walking down the street, stuck a gun at him and took his money.

MR. MCCANN: Your Honor, we're not here to go over his prior crimes. The issue here is intellectual disability.

THE COURT: I get that and perhaps it's just because your expert witness has sort of talked about that type thing, so I'll give you a little bit of leeway.

Q. (BY MR. PEEBLES) So, I guess the question was: How does the analysis get affected if the person had been sent to prison before, so had a little exposure to the consequences, and the previous cases that landed them in prison were 100 percent kind of individual crimes with no other gulling factors?

A. Well, I'll tell how they connected. Gullibility is a subtype of foolish behavior and foolish behavior is behavior that fails to take into account the likelihood of some very bad consequence occurring. It can take place in a personal context where the person is being

pressured, which is what I call gullibility, or it can take place in a context where no one else is involved. The thing that [222] unites these is what you might call stupid behavior and if you show me somebody who commits the same kind of crime every time, whether or not it's in a social context, and the same kind of bad outcome happens every time, then we go to jail, that's very congruent with gullibility and it's very congruent with a diagnosis of intellectual disability. Most of my recent papers have more to do with foolishness than with gullibility.

Q. And this is kind of a crazy example but you've been here sitting in testimony today, right?

A. Yes.

Q. And you saw Mr. Fronckiewicz take the stand, the writ writer. Remember him?

A. Yes.

Q. He'd been to prison over and over and over again, right?

A. (No response.)

Q. Right?

A. Yes.

Q. A history of foolish choices. And nothing about him struck you as being mentally diminished, did it?

A. Well, actually, I have a four-factor model of foolish behavior.

Q. I apologize. Nothing about him struck you as being mentally diminished, did it?

[223] A. No, he seemed pretty sharp.

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REPORTER'S RECORD
VOLUME 3 OF 14 VOLUME(S)
TRIAL COURT CAUSE NO. 314483-C

APPELLATE COURT NO. _____

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

EX PARTE

v.

BOBBY JAMES MOORE

WRIT OF HABEAS CORPUS

On the 3rd day of January, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Susan Baetz Brown, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Carrie Logan, Texas CSR No. 3150
Official Court Reporter, 185th District Court
1201 Franklin
Houston, Texas 77002

* * *

[4] Q. Doctor, how many years have you been specializing in evaluating people for mental retardation?

A. Since around 1975.

Q. And recently you've done quite a bit of consulting [5] for lawyers and courts on this issue, correct?

A. Yes, subsequent to the Atkins decision, I started getting requests to help in these kinds of cases.

Q. Do you typically testify for the defense or for the prosecution or both?

A. I've only been contacted by the prosecution once. I certainly would be willing to help the prosecutor if I felt able to. But the vast majority of my consulting has been at the request of defense attorneys; however, I should point out that I don't always agree to help. I'd say, in about a quarter of the cases, I'd say I don't think you have a case here for me.

Q. How many times have you actually tested somebody for mental retardation post-Atkins?

A. Well, about half the time I function as a kind of a teaching expert, which is my role here. About half the time I play more of a clinical role where I do the teaching but I also give a diagnosis and—

Q. And I appreciate that answer but my question really was: How many times would you estimate that you have actually done the testing on someone for mental retardation?

A. 10 to 12 times but I haven't testified in all of those cases because I didn't always find for mental retardation.

Q. So, in the times when you have—you said, what? [6] 12 to 14 times you've tested for MR?

A. Something like that.

Q. What percentage do you think you found the person was MR versus was not MR?

A. Well, I should point out I don't do a comprehensive evaluation. I focus primarily on adaptive functioning and I rely for the most part on other tests—usually there's several—to get at Prong 1, intellectual functioning, so I would—

Q. And I apologize. I appreciate that information; however, I really just wanted to know, of those times that you've tested, were you able to definitively diagnose someone as either, yes, they're MR or no, they're not, or what was the numbers on each side of that?

A. I would say about two-thirds of the time, yes and one-third of the time, no. But I don't get involved in the case unless I see there's at least a prima facie case that can be made.

Q. Okay. Now, you said you don't do a full-blown test when you test for MR. Of the ones that you've just talked about, were those full-blown tests or were they not full-blown tests?

A. No, I don't do IQ tests. Even though I've taught IQ courses many years ago, I don't do IQ testing, so.

Q. Under the current standards or even the prior [7] standards for what constitutes MR, isn't a full-scale IQ test part of that standard?

A. Yes, and there always is one.

Q. Okay.

A. If there's not one in the record, and there almost always is, I request that someone who is more current with IQ testing do that.

Q. So you review someone else's work?

A. Correct.

Q. Someone that performed those tests in your absence, I assume?

A. Typically, yes.

Q. Typically? Have you ever been present when someone else did a full-blown IQ test that you then relied on to form an opinion on mental retardation?

A. On one occasion that test—that case was resolved without my testifying.

Q. Have you ever come under professional scrutiny by any of your peers?

MR. MCCANN: Objection. Could my colleague rephrase so that we understand what that meant?

THE COURT: Please. If he can't answer the question.

A. Well, I received awards from my peers. I've never been sanctioned or criticized by my peers.

[8] Q. (BY MR. PEEBLES) Have you ever been sanctioned or criticized by any Courts in which you've testified?

A. Yes. There was one Judge, a federal Judge in Puerto Rico, who took a dislike to me, said some negative things; but to my knowledge that's the only time.

Q. In fact, that federal Judge issued a federal opinion warning Courts across the country to be cautious in reviewing your testimony, didn't he?

A. That's my understanding.

Q. That opinion came out about one year ago, didn't it?

A. Yes.

Q. It was when you evaluated a gentleman by the name of Alexis Candelario Santana.

A. I didn't evaluate him. I was a teaching expert in that case.

* * *

[40] Q. Are you aware of any standardized adaptive testing done in this case?

A. Yes. The only one I saw was Dr. Compton, I believe, did something called the Texas Independent Living Scale, which is what's considered a direct measure of adaptive behavior. There are also rating instruments such as the Vineland I just mentioned.

Q. Okay. What was—

A. But there are a small number of direct measures which are like IQ tests.

Q. Okay. Let me stop you. And again, do you recall the score that was listed on the Texas instrument that Dr. Compton gave?

A. Yes. It was—well, she said it was two and a half standard deviations below the mean, which is, below 70. It would be the equivalent of something in the 60s.

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VOLUME 3 OF 14 VOLUME(S)
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Official Court Reporter, 185th District Court
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Houston, Texas 77002

* * *

[83] Q. Would you introduce yourself to the Court?

A. My name is Kristi Compton.

Q. And can you spell that for the record?

A. K-R-I-S-T-I C-O-M-P-T-O-N.

Q. And is it Dr. Compton?

A. It is.

Q. Dr. Compton, what do you do for a living?

A. I'm a clinical and forensic psychologist. My [84] primary practice is in Dallas, Texas.

Q. How many years have you been licensed to do that?

A. 12 years. I'm sorry. 14 years.

Q. In your capacity, are you sometimes asked to qualify as an expert and testify in court in matters regarding mental health?

A. Yes, I am.

Q. Have you done that many times or a few times?

A. Many times.

Q. Approximately how many?

MR. MCCANN: Your Honor, we would stipulate that Dr. Compton's an expert on this subject matter.

THE COURT: Fair enough.

Q. (BY MR. PEEBLES) Then briefly, then, to surpass all that, is it safe to say you've been an expert over 70 times and you've done over 30—I'm sorry, over 3,000 forensic evaluations?

A. I have.

Q. Are you limited in the area around Dallas or do you go throughout the state?

A. I do most of my work now in Dallas and Collin County but I have gone around the state as well as Louisiana, Kansas and Oklahoma.

Q. And today you're here because I hired you, correct?

A. That is correct.

[85] Q. Are you frequently hired by the Government or are you frequently hired by the defense or both?

A. About 50 percent of my work is directly from the Court; neither side retained me. The other 40 percent is defense attorneys retain me; about 10 percent is prosecution.

Q. When I hired you, tell the Court what my instructions to you were as far as how you should approach this case.

A. You did not give me instructions. You told me you were going to send me a lot of documents if I agreed to take the case and once I had some semblance of an opinion, to contact you.

Q. Okay. Did I try to lead you to lean one direction or the other?

A. No, sir.

Q. Tell the Court the official definition of mental retardation.

A. There's three definitions but they all converge. I'm just going to give you one, okay?

THE COURT: Fair enough.

A. The first one is there has to be onset of a developmental disability prior to age 18. The second criteria is the standardized intellectual assessment that's usually two standard deviations below the mean, which in [86] most IQ tests, it's going to be around 70 is right where it's going to fall. Also you have to have adaptive deficit in social, practical, conceptual skills.

That is across the board, whether it's the AAIDD, the DSM-IV or the ICD-10.

Q. (BY MR. PEEBLES) And of those three, where is the majority of the emphasis placed?

A. It is now with adaptive deficits or adaptive functioning. That is the primary. It supersedes the, you know, raw intelligence score.

Q. So, is IQ the deciding factor?

A. It is one factor but it's not the deciding factor. Someone could have a lower IQ but higher adaptive functioning and not qualify for a diagnosis of intellectual disability. Conversely, somebody could have an IQ of 75 but have exceedingly low adaptive functioning and qualify for a diagnosis of intellectual disability.

Q. Then what is the practical definition of IQ?

A. The practical definition is the ability to learn, the ability to process, the ability to navigate your surroundings and your life and be effective in what you're doing.

Q. So, would it be fair to say then for a reliable result, you need to have an IQ that correlates to these deficits in adaptive behavior?

A. That is ideal, yes. You want to have a correlation [87] between all the measures.

Q. Okay. Then describe adaptive functioning and how it's related to a diagnosis of mental retardation.

A. Well, as I said, there's really three primary areas in adaptive functioning. Each one of those areas has a lot of subareas. Like in communication, that is one area or practical skills. Can you communicate your needs to somebody, can they communicate their needs to you and you understand them. Do you have the

ability to go into a store and say this is what I want or this what I need, do you have the ability to call a doctor or call a dentist and make an appointment. Those are communication skills, ability to communicate and interact with one another.

Social skills falls also within that category. You have practical skills, which is just everyday living skills, money management, independent self-care, brushing your teeth, taking care of yourself, keeping yourself clean, being able to cook things for yourself. Of course this is in the community, not in a prison environment, per se, but practical everyday skills, using a bus, using public transportation.

Q. Are there any genetic causes of mental retardation?

A. Oh, there's—yes, yes. The most common is Down Syndrome. There's also what's called Fragile X Syndrome. There's a range of genetic conditions that are related to [88] intellectual deficits.

Q. And you and I have had an opportunity in this case to review quite a volume of documents as well as now to personally evaluate Mr. Moore, correct?

A. That's correct.

Q. Have you seen anything to suggest that Mr. Moore suffers from a genetic-based mental retardation?

A. The only thing that I saw was that there were intimations that his mother and, I believe, his sister suffered from low intellect. They have never—in the records it wasn't diagnosed, so there is a suggestion of a genetic linkage; however, there was never any type of diagnosis to show that it was a genetic condition and it was a risk.

Q. So we move out of the area of genetic-based and we move into kind of external nongenetic factors. Which of those are possible bases for mental retardation?

A. The nongenetic environment?

Q. Yes.

A. Yeah, there's a lot of them. I mean, you have low poverty, you have exposure to toxins, you could have a serious illness like meningitis or a high fever that can result in intellectual disability. In addition there are, you know, perinatal and postnatal causes, you know, oxygen deprivation at birth or, you know, toxic exposure while a [89] mother is pregnant can relate to—

Q. And in fairness to Mr. Moore, did you find anything in this case that could—not necessarily that does, but that could be a basis for one of these external factors?

A. Absolutely. I think it was pretty well documented in the record that there was exposure—lead—no, it's not lead exposure. I don't remember the exact exposure. It was toxic exposure within his neighborhood that was documented within the record. There was poverty. No doubt I'm sure there was poor nutrition at times, that was documented, and as I said, there were intimations that his mother and sister possibly had low intellect.

Q. You're not suggesting that every person that's exposed to these things will become mentally retarded, right?

A. No. These are risk factors but a risk factor does not automatically correlate to a diagnosis.

Q. Nonetheless you kind of put it in your toolbox and considered it in light of everything that you saw; is that fair?

A. Absolutely.

Q. Let's talk a little bit about IQ. Is that something that you would expect to see change over time as someone ages?

A. Very limited change. IQ is one of those constructs [90] that has relatively good stability. You'll see some slight variations from day to day, just depending on sleep, hunger, et cetera. But the main core, the range of IQ score that a person's going to have remains relatively stable.

Q. What about the other prong, adaptive functioning? Is that something you expect to see change over time as someone ages?

A. There are slight changes and sometimes there's great changes in adaptive functioning. It's exceedingly rare. I have heard about it. I've never actually seen it myself. But certainly as we live, all of our adaptive functioning hopefully will increase through experience.

Q. So, keeping those things in mind, would someone likely qualify as mentally retarded at one point in time and then at another point in time they're not qualifying as mentally retarded?

A. Unlikely. There are—as I said, there are very few cases where that has happened but it's unlikely and very rare.

Q. What's the standard methodology that you would employ in a forensic evaluation?

A. Always in all forensic evaluations, I do standardized testings. I interview people and I ensure that I do effort testing if it's cognitive-based deficits I'm assessing or outright malingering testing if I'm assessing [91] schizophrenia or some other type of psychosis and there's an alleged insanity or incompetency. So—but the methodology is the same regardless of what type of evaluation I'm doing in that there's always standardized testing, there's always effort or malingering testing and interview.

Q. Now, I'm sure the Court's well aware of this but when you say "standardized testing," you basically mean that these tests have been tried and true and these are what everybody in the professional community has accepted as being valid and accurate; is that a fair summary?

A. That's fair enough, yes.

Q. And the test that you administered ultimately to Mr. Moore, they fall into that category, too, right?

A. Yes, sir.

Q. You mentioned effort testing, sometimes known as malingering. Why do you consider that to be important when you're administering these tests?

A. It's important in forensic context or in disability context, somebody seeking compensation because there is an external motive and the only way you know if your testing is valid and you're giving accurate information to whoever is asking for it is if you do effort testing or malingering testing.

Q. Is there a difference, in your opinion, between those two, effort versus malingering?

[92] A. There is. Malingering is more of an extremed, feigned characterization of symptoms. Often it's comical because you can pick it out immediately. Effort testing is, and also as Dr. Anderson said, symptom validity testing. So it's called different things; you're assessing if effort was put forth on the testing because you don't know, because anybody can take a test and if you don't put forth effort, then you don't really get a true representation of this person's ability.

Q. Another thing you've heard as you've—and you have sat in the courtroom from the beginning of testimony and heard everything every witness has said, right?

A. I have.

Q. Okay. You've heard the Flynn Effect brought up.

A. I have.

Q. Describe for me what the Flynn Effect means.

A. There has been a observation in the research that intelligence is gaining about 3 points every decade across industrialized nations. There is research now that it's starting to slow down a little bit, so I think the Flynn Effect will not be as great in the future, but it just means that tests that were normed at one point in time may not be reflective of the true intelligence of any given age group or cohort now. So, you have to adjust it by 3 points after ten years.

[93] Q. So, it's sort of like adjusting an IQ test based on the inherent changes of your population group?

A. Absolutely. You said that much better than I.

Q. Thank you. What methodology did you employ when you were evaluating Mr. Moore?

A. He was administered what's called the Wechsler Adult Intelligence Scale, Fourth Edition; it's the most current one, up to date. It was released in 2008. I gave him selected subtests of what's called the Wechsler Memory Scales, Fourth Edition. Not all of them. We spent about six hours together and at that point there was just a couple that did not get administered. What I did make sure I administered on that test was all of the subtests that allows to assess for effort. I didn't skip on any of that at all.

There was two things that we were not able to do. I administered what is called the Test of Memory Malingering, which is defined as a effort test, and he was administered the Wide Range Achievement Test, Fourth Edition, which Dr. Anderson administered one subtest of that. And then the Texas Functional Living Scales, which is an adaptive functioning measure. It's not—you know, you ask questions, you ask people to do things for you.

Q. And we'll talk in more detail in a little while about those tests.

[94] A. Okay.

Q. But for now, tell the Court when you did the evaluation and where you did the evaluation.

A. I conducted the evaluation on January 1st, Sunday (sic) of this year, at the Harris County Jail.

Q. Two days ago?

A. Two days ago, yes.

Q. I also provided a lot of documents to review prior to doing any of that testing, didn't I?

A. You did.

Q. And some of those documents actually originated from the defense that I then just passed on to you; is that right?

A. That's correct, yes.

Q. Can you explain to the Judge what those documents generally consisted of?

A. There were school records, past psychological testing results, there was records from TDC, transcripts from the original trial, transcripts from the 2001 hearing, letters Mr. Moore had written to his attorney, motions Mr. Moore had written.

Q. Fair enough.

A. Okay.

Q. And some business records as well, commissary records, disciplinary records from prison?

[95] A. Yes, yes.

Q. At some point did I also supplement those documents with a whole slew of photographs that were taken at TDC from items inside Mr. Moore's prison cell?

A. Yes.

Q. When you reviewed the documents—not asking you about the actual testing that you did yet, but just reviewing the documents that you had, what did you learn about Mr. Moore's intellectual functioning during his developmental years?

A. The only time he was administered a standard IQ test was when he was 13 years old and that yielded a score of 78, which is borderline, Flynn-adjusted, and I'm not sure, and I'm still not sure from looking at the record, if it was the WISC that he was administered or

the WISC-R. Those are, you know, normed at two different times. Benefit of the doubt, say it was the WISC, Flynn-adjusted, we probably take it down to about 69 or 70 but with the WISC-R, probably take it down to about 73 or 74.

He had some other tests administered. The only other two IQ test was the Slosson Intelligence Test and the Otis-Lennon Mental Abilities Test. Both of those are group tests. They don't have high validity. Certainly there is research that the SIT or the Slosson, back in the 1970s, had extremely poor validity in determining mental [96] retardation. Then there was the Bender-Gestalt and the Goodenough Draw-a-Man Test. Those are brief neuropsychological screenings but are not IQ testing.

Q. All right. And so, of all of those, the—I guess what I'm hearing is that you would place more emphasis for your purposes on the very first test when he was 13?

A. That was the only test that was a full-scale standardized test, yes, so that is what I was relying upon.

Q. What are some of the things that could cause a low IQ score in childhood besides mental retardation?

A. Oh, boy. Being a traumatized child certainly can cause low IQ scores. Children who are traumatized have difficulty focusing and learning because their environment is so stressful. Being tired, not getting enough rest.

Q. Did you see anything in any of those documents you reviewed to suggest that Mr. Moore was a traumatized child?

A. I think Mr. Moore was exceedingly traumatized as a child.

Q. For what reasons?

A. I mean, from what I could tell, from what his family had reported, he was abused pretty severely by his father. And I think abuse is traumatizing for anyone.

Q. Just in case anybody in the courtroom's wondering about your responses, I told you before you testified to just tell it like it is, right, regardless of who it [97] benefits or who it doesn't. Isn't that true?

A. And that's what I'm going to do, yes.

Q. Okay. Absolutely. How about IQ testing after he was incarcerated?

A. He had an IQ test which revealed a score of 71. I don't know what type of IQ test it was. They said there was a WAIS in the records but there was no form in there. It may have been a brief one, it might have been a full-scale one, not really sure. Then the next time where I actually have a record, there was an IQ testing done in 1989. That was the WAIS-Revised. And he had a full scale IQ on that, I believe, of 74, non-Flynn-adjusted, but 74 at that time.

Q. What's probably the biggest problem of trying to utilize or interpret IQ scores that were done after his incarceration?

A. Okay. I'm going to answer this as easy as I can. The biggest problem is that certainly when you're incarcerated, you can be depressed. A lot of men and women who are incarcerated have a period of depression that lowers IQ scores. In addition, as I've said before, you don't know the validity of a test if you do not have effort testing associated with it. And I worked

in a prison; you don't give effort testing because that's not the point. The point is to see if you have an IQ score and what is that going to do as far as housing considerations and placement.

[98] Q. Also, in reviewing the documents, what evidence did you find of limitations and adaptive functioning prior to his arrest?

A. I think there were limitations in adaptive—I'm sorry—academic skills in his development and there was some deficits, adaptive deficits I think in social interaction during his childhood.

Q. Did you also see evidence that he was kicked out of his house at a particular time?

A. I did.

Q. And how would that affect your analysis?

A. I don't know specifically what his adaptive skills were from the age of 14 to I believe 17 or 18 is when he was arrested. There isn't a lot of information during that time except he was living in the back of a pool hall, that was told. He was, you know, playing pool for money and mowing lawns. So, there is some ability to understand money concepts and work.

Q. Which kind of leads us into the next area. In reviewing all of the documents you had, what evidence is suggestive that Mr. Moore does have adaptive skills and has used them in the past?

A. Well, as I said, in order to survive on the streets, obviously he had to engage in some adaptive behavior. There's money concepts and work concepts involved [99] with mowing lawns and playing pool.

Q. How about his testimony in his trial?

A. Testimony during his first trial, he was able to respond to the questions posed by both his attorney and the State's attorney and respond accordingly and he was able to conceptualize what was being asked and form exculpatory statements or responses at times, indicating an ability to engage in abstract reasoning to some degree.

Q. And he was questioned by both the prosecutor and the defense lawyer when he testified in that trial, wasn't he?

A. Yes, he was.

Q. He testified for quite a long time, right?

A. I don't know the exact amount of time. The transcript was, you know, fairly long. I did not pay attention to the time limit.

Q. Did you see anything about the nature of the present offense, the circumstances of the crime that would indicate implementing adaptive skills?

A. I think what's been talked about already in court. I mean, as a forensic psychologist, I look at the behavior that surrounds a crime. Wearing the wig, covering up the gun and going to Louisiana all indicate a level of planning and forethought and ability to appreciate the need to do something not to be apprehended and that relates to [100] abstraction.

Q. What about evidence of acquired adaptive skills postoffense; in other words, after he was convicted?

A. Certainly. He's learned how to read and write in prison. As far as all the motions that were composed, I don't know if he wrote those or not. I do have letters that he wrote to significant others or friends of his and I'm making, I think, a reasonable assumption that nobody wrote those for him and certainly he has a

writing ability at this point, you know, that approximates about a seventh grade level.

He was able to somewhat defend himself in court, he represented himself *pro se* for a short time period, so he had these adaptive skills that have developed while he has been in prison or were marginally present before.

Q. And you brought up a point, which is that you don't know personally whether Mr. Moore wrote those motions or wrote those letters but you also don't know that he didn't, correct?

A. I don't know.

Q. And so, is it your belief that given the volume of all this stuff, it's more likely that he wrote it?

A. Some of them are handwritten and I am not a writing expert, but it appears to be in writing quite similar to [101] his. So, I mean, the assumption is that he did write some of them.

Q. Did you review the expert witnesses that testified for the defense in his retrial?

A. I did.

Q. What was their final conclusion on whether or not Mr. Moore met the criteria for mental retardation?

A. Neither one of the experts believed he met the criteria.

Q. Now, in reviewing recent documents, what evidence have you found that supports a finding that he's mentally retarded, meaning have you seen anybody else that has done an assessment that determined he's mentally retarded?

A. No.

Q. Okay. Let's talk about your actual testing.

A. Okay.

Q. That you did on Mr. Moore.

THE COURT: You know what? Let's stop. It's almost lunchtime, since we're sort of switching gears. So, we'll be in recess for 30 minutes.

MR. PEEBLES: I'm not even going to leave, Judge. I'm going to sit right here the whole time.

THE COURT: You are not who I'm worried about, let the record reflect.

All right. We're in recess until—let's say [102] 12:30. That makes it 35.

(Lunch recess.)

THE COURT: All right. If I can have the witness back, please.

All right. And you may proceed.

MR. PEEBLES: Thank you, Judge.

Q. (BY MR. PEEBLES) Dr. Compton, when we left off, I was about to ask you about the actual testing that you administered on the applicant Bobby Moore. When you started that, is there something that you do at the beginning of every single assessment that you also did in this case?

A. Yes. I always give someone a consent form. I ask them to read it. I read it to them. The consent form documents that I'm either retained by the State or the defense or by the Court and that I will be doing psychological testing and I would be assessing their effort on some of this testing and that I'd be submitting a report to parties, or findings to all parties. He had the right to refuse. He did not have to go forward with the

examination and at all times he needed to let me know if he would get tired, fatigued, hungry, needed to get up and stretch, anything to make it comfortable and increase the validity of the testing.

Q. In any of the 3,000 examinations you've done, if you conclude that the subject doesn't understand that form [103] or doesn't agree to what's on that form, then do you continue the testing or halt it?

A. It depends on what type of—I mean, if it's a competency exam, I go ahead, because it's Court-ordered and I have to have it. Otherwise, no, I stop the examination, try to reframe it or I just completely terminate. If they refuse, of course, I terminate the evaluation.

Q. In this case did Mr. Moore understand that form?

A. He asked about two words and the two words that he asked about was "validity," what did that mean, and "distorted," what did that mean. I explained both of those to him, then he read it, signed it and I asked a officer to come in and sign it as well because I always—I try to have a witness sign the consent forms.

Q. So, at the end of that interaction were you comfortable that he understood his contents (sic) and was consenting to go ahead with the test?

A. Yes. I do believe so.

Q. Let's talk about the actual test then.

A. Okay.

Q. How did you begin?

A. You know, first I just talked to Mr. Moore, asked him about his personal history a little bit. I knew quite

a bit. And then we began with testing. And the first thing that I did was administer the Test of Memory Malingering.

[104] Q. Describe for the Court what the memory malingering test consisted of and what Mr. Moore's performance showed.

A. It's a very simple test. You show a person a picture and ask them to remember it. It's 50 pictures, common, like, everyday pictures. Once you're done with that, you show them 50 pages containing two items and then you say, Which one did you just see? It's a test that's really insensitive to brain trauma or intellectual deficits and there is research on this instrument. So you do that, you give them one trial, then you give them a second trial and then 15 minutes later, you do what is called a retention trial, just to see what they remembered.

Q. When you administered to Mr. Moore, what were your findings on that test?

A. On the first trial, he correctly identified 24, which is below chance level and it's suggestive that he was not putting forth full effort. On the second trial, he obtained a score of 40 but the clinical cutoff is 45, so it's just slightly below.

And when you're looking at norms for people who are mentally retarded, if we wanted to say Mr. Moore's mentally retarded, if I wanted to look at that, as far as the research is—indicates, that would just be right on the very edge, I mean, it's just okay performance but nothing that would say, oh, yeah, he's out there, he's [105] malingering. And on the retention trial, it was the same thing.

Q. Did you do any other tests that would be effort testing or malingering tests?

A. Yes. There are embedded measures within the IQ testing and within the memory testing. All of these measures were normed at the same time. It's called the Advanced Clinical System. All of them were normed during the same period of the Wechsler Memory Scales and the Wechsler Intelligence Scales, so they have the same cohorts of people, which is a benefit.

Q. Is it easier then to talk about Mr. Moore's performance on those now or to talk about them as we discuss each test?

A. Probably just talk about them now.

Q. Okay. Then what were the—your interpretation of his results on those embedded effort and/or malingering tests?

A. This is all calculated on base rates; that is, how common you see it in a population. You can either choose a 50 percent base rate, a 15 percent, a 10 percent, a 5 percent or a 2 percent. To give Mr. Moore the absolute greatest benefit of the doubt, I chose the strictest criteria, which is 2 percent. I did not compare him to the overall clinical sample. I compared him to people who were [106] known to be diagnosed with mental retardation so I could compare his performance exactly or compare it comparatively to those who have mental retardation. I also compared it to people who have traumatic brain injury and to those who have an educational level less than eighth grade because I believe Mr. Moore was seventh grade. There's also various norms for people of different ethnic cultures because sometimes that changes. So he was compared

to specific groups and not to the overall clinical sample.

Q. And since you've been in here to listen to the testimony, I think there was some mention that maybe folks that are mentally retarded are not the best candidates to test for effort testing but is what you just said that you kind of took that into account by pigeonholing him into that more specific group?

A. Yes, in some regards but the embedded measures—I want to be very clear about this. The embedded measures, they were normed on people who have mental retardation. The Test of Memory Malingering, they are up and down on the research studies but the primary research studies that I've reviewed, there's a strong specificity rate with that with people who have mental retardation. Now, the Rey Dot Counting Test, no, it has horrible reliability.

Q. Okay. Then let's move into the substantive testing that you did.

[107] A. Okay.

Q. What was the first area of substantive testing?

A. That would be the Wechsler Intelligence Scale.

Q. Describe to the Court how you administered that and what results you saw from Mr. Moore.

A. It has nine subtests, Your Honor, and there's various type of tasks you ask people to do. Some are verbal, some are visual, some are motor skills. It's asking general knowledge questions, math questions, you know, abstract reasoning judgment questions, and you go through all of those testing and then you calculate it and get a standard score and a statistical score.

Q. And what was your interpretation of Mr. Moore's performance on this?

A. His performance on this test, he obtained a full-scale IQ, and I'd have to go back and look but I believe it was 57 and then I adjusted it for the Flynn Effect, so I think it took it down to 54.

Q. Now, did you have any thoughts at that point about getting a result like this on that test in light of the previous testing and documents that you had already reviewed?

A. I was surprised by that result. I thought it would be higher. I fully expected him to fall somewhere within the 70s, based on what I'd seen and based on his history, [108] quite honestly, and education level; so, yes, that was a surprising score to me.

Q. Okay. Is there anything else we should discuss in all candor or fairness with the Judge about this test or does that pretty much summarize what you find important about that test and we can move on to the next one?

A. There's a couple more things about that test that I found important. When I administer the test, there is a subtest called the information subtest and it just asks general knowledge questions and one of them that I found surprising was I asked him what is a thermometer and he said, I don't know. He said, A thermometer, I don't know.

However, in 1989, when he was administered the test, he could describe what a thermometer is. And there was discrepancies throughout the test that I saw that indicated suboptimal performance in addition to the effort testing that was conducted.

Q. Well, what was the next area that you went into?

A. That would be the memory scales and those were primarily administered so I can use the embedded measure just to make sure that my IQ testing was valid.

Q. And did you—I mean, was that a successful test? What were your results and your interpretation?

A. The tests were very similar to the intelligence scale, same type of scores, pretty low, lower than what I [109] expected but fairly low and some indications of suboptimal effort. But not across the board. It was variable effort.

Q. Okay. What's the next area that you would find important to our hearing from your testing of Mr. Moore?

A. I gave him academic testing. His academic testing all fell within the third grade range or second grade. Third grade for reading comprehension and writing skills and second grade for mathematical skills, which is not consistent with his writing that I've seen. And I'm not talking about the motions; I'm talking about the writing to his friends that he's had outside. As I said, when you look at his writing and you calculate what is called the Flesch-Kincaid, and that is readability level, it's at a seventh grade level. So that did not make sense. There was just these areas within the testing that were not consistent and did not comport with what I'd seen.

Q. Okay. And then what's the next area of testing that you went into?

A. That would be the functional living scales.

Q. And Mr. Moore's performance on that test?

A. Two standard deviations below the mean.

Q. That in line with what you were seeing up to that point in your interaction with Mr. Moore?

A. I'm not sure if I can answer that as far as being in line. Part of it, I could not administer, so the score [110] is not an accurate reflection of his abilities because he had never had exposure to a checking account and I believe that's probably true. I mean, he was pretty young when he went to prison, I don't think he's ever written a check and one of the skills is, you know, can you write a check. Another skill is, Read this recipe and punch in the microwave. He never used a microwave before, so that would have been invalid to—so I could not score that, so I had to give him zeros on those areas which deflates—artificially deflates or could potentially artificially deflate his overall adaptive score.

Q. And in fairness, you heard me ask questions of family members about stoves and microwaves and it was for that purpose.

A. Sure.

Q. To show that he didn't have exposure to a microwave, at least that we're aware of, correct?

A. Correct.

Q. So it would have—okay. So you wouldn't have expected him to be able to, on that test, show you how to operate an object he'd never seen or used.

A. No, I would not.

Q. Okay. Anything else about that test that you found noteworthy?

A. I don't believe so. I'll take a look.

[111] Q. And if not, that's fine. We'll move into the next test.

A. No, nothing there.

Q. All right. Then just for reference, you were with him for about six hours?

A. Correct.

Q. And so how far into that six hours are we at this point, roughly?

A. Probably about four and a half.

Q. Okay. So, now you roll into what test?

A. This is really more of—it's called the Advanced Clinical Solutions. It is a subset of the Wechsler Scales because you use some of the information off of the Wechsler Scales to calculate—excuse me—to calculate effort levels.

Q. Okay. How did you administer that test to Mr. Moore?

A. Again, it's the exact same way like with the IQ test or any type of testing. You give them a task, ask them to do it or you ask them questions and they respond to you. Thank you.

Q. Uh-huh. How did you interpret Mr. Moore's performance on that test?

A. As I said, I chose the strictest criterion, which would be a 2 percent base rate. 31 percent of people who [112] are classified as mildly intellectually disabled or mild mental retardation, whatever term we want to use here, 31 percent score at that rate, at 2 percent below the base rate. So, more than 50 percent would perform better than that in that area. Only 6 percent of those with traumatic brain injury have a

score below the second percent base rate. 7 percent of those with an education below eighth grade would score below the second base rate, or second percentile base rate.

Simulators, which just mean people who have been instructed to fake, because all of these, they have, you know, controlled research designs where they have a group and they'll tell a group of people, We want you to fake something and see how it turns out. 22 percent of people who are faking will get a score in that range.

And then the only other criteria that I really looked at was, you know, race and ethnicity and it's 3 percent of African-Americans within the standardized sample would have a score that low.

Q. Did you then go into any other—did you administer any additional instruments to Mr. Moore?

A. Oh, no. That's all of them.

Q. Okay. So, at this point now, you're six hours into your interaction with Mr. Moore and you guys are finished?

A. That's correct.

[113] Q. Describe for the Judge just Mr. Moore's general appearance, his—you heard me ask another question. If a layperson was a fly on the wall watching this, what would they think? How would they describe him? Tell the Judge.

A. I believe they would probably think he was being cooperative with me. He was adequately groomed. He made variable eye contact. He didn't make, you know, real great eye contact but sometimes he did. He responded to my questions. His responding was slow but he responded in a logical and goal-directed manner.

Q. Are there learning disabilities or other reasons that someone may process information slower and not be mentally retarded?

A. Well, sure. There are perceptual deficits that people can have. There are sensory motor deficits that people can have. There are a range of learning disabilities. Depression makes you respond a lot more slowly. Being concerned or being very careful make you respond more slowly. So there's a host of reasons and you can't say that responding slowly is endemic and only endemic of mental retardation.

Q. Okay. And I don't want to ask you just yet what your ultimate opinion is on whether Mr. Moore was—is mentally retarded or not, but suffice it to say that this examination that you did is a very key element of your [114] overall thought process for Mr. Moore, correct?

A. Certainly it's a key element, yes.

Q. Okay. But there's other things that you consider as well.

A. I have to. I can't just rely on my assessment.

Q. And what I want to do with you now is ask you about kind of three general areas.

A. Okay.

Q. One general area is some of the business records that I provided for you to look at. Another area is going to be the photographs that you were given of items in Mr. Moore's prison cell.

A. Okay.

Q. And then the last one is going to be portions of this record, the testimony, the motions of the courtroom proceedings before he got to you, for lack of a better term.

A. Okay.

Q. Fair enough?

A. Sure.

Q. Okay. So, let's first look at the business records that I gave you. Now, one of those was these records right here and this has been admitted as—

THE COURT: Steve, will you flip that screen so it's easier—one of those two; it doesn't matter which one—for me to see that. Thanks.

[115] Q. (BY MR. PEEBLES) Now, this has been admitted as State's Exhibit 23. So, this is in evidence. And do you recognize this as being a packet of commissary records that I've provided you for your review?

A. Yes.

Q. Okay. And you and I have discussed this and would you agree—and this is not for an exhibit but just for assisting in testimony—is this a fairly accurate kind of breakdown of what's in this packet, listing transactions by date, by this—this column is the amount below the $85 limit that that order was and then what page it exists in the exhibit?

A. Yes, sir.

Q. All right. And when we went through this, didn't we agree that all of the lines that are in yellow are orders that Mr. Moore calculated and placed where the order was within $1 of the $85 limit?

A. Yes, sir.

Q. Okay. Having reviewed those records, how did the fact that Mr. Moore was required to itemize and calculate prices play into your analysis on mental retardation?

A. In two ways. First of all, in the testing that I conducted, the academic testing, he was able to do more advanced math at times and then other times missed very simple questions, which was not consistent. When you're [116] looking at the commissary records, whether it's multiplication or he is, you know, adding successive—

Q. Successively?

A. Thank you. Or if he's adding that way, that still requires some level of mathematical skills. And the mathematical skills that it would require is higher than the second grade level that I obtained on the testing.

Q. And in your testing you did require him to perform addition, right?

A. Oh, yes.

Q. And some of that addition involved three-digit numbers, didn't it?

A. Yes.

Q. And some of those Mr. Moore had no problem completing correctly; isn't that accurate?

A. Some of them, yes.

Q. Okay. I'd like to show you what's admitted as State's Exhibit 25. And in State's Exhibit 25, is it fair to characterize these as kind of disciplinary records

from the prison from back when Mr. Moore's Texas Department of Criminal Justice number was 268973?

A. Yes.

Q. So prior to his incarceration on death row.

A. Correct.

Q. On page 25 of this document—and I can zoom in if [117] you need to read it, but do you recall seeing this where there was a disciplinary issue, an offender was found in Mr. Moore's cell and when questioned, he said he was there to play dominoes?

A. Yes.

Q. Okay. Does the fact that Mr. Moore was playing dominoes or that an offender was in his cell to play dominoes have a bearing on your analysis?

A. It's one piece of information and certainly there's some social interaction. Dominoes, you have to count.

Q. I'm going to go to page 43. And this is a letter from the Texas Department of Corrections to the manager of the Two-K Restaurant, right?

A. Right.

Q. And do you remember seeing some indication that Mr. Moore used to work at the Two-K Restaurant?

A. Yes.

Q. Now, two things I'll draw your attention to. On this questionnaire, the manager was asked: What is Mr. Moore's level of proficiency?

A. Uh-huh.

Q. Now, in fairness, there's some boxes here to check and Mr. Moore was checked in the third lowest box.

A. Yes, at "limited skill."

Q. And how does—can you read for the Court and for [118] the record what it defines as "limited skill"?

A. Does simple tasks using required tools. Requires close supervision for more complex tasks.

Q. Okay. So, at least this employer is not saying that Mr. Moore is highly intellectual and independent but he is saying that he can operate in the capacity, I guess, that he was there for?

A. Yes.

Q. Is that fair?

A. Yes.

Q. Over here this says: Are you aware of any discipline problems with the man, correct?

A. Uh-huh.

Q. And this says: Capable of influencing others to dissent, likes confrontation.

A. Yes.

Q. How would that play into your analysis?

A. In that he had the ability, the conceptual ability, to try and influence other people. And that is a conceptual skill in some regards.

Q. In fact, in the—you've heard of the Briseno case?

A. I have.

Q. And in the Briseno case, one of the areas they suggest Courts should consider when evaluating Atkins claims [119] is whether or not somebody has leadership skills, right?

A. Yes.

Q. Or the ability to kind of, well, lead others. And so would this, capable of influencing others to dissent, sort of fall within that category?

A. It's one piece of the pie. It's one piece of information, yes.

Q. Fair enough and I certainly don't want you to overstate anything.

A. Yeah.

Q. All right. In State's Exhibit 24—all right. State's Exhibit 24 would be a similar disciplinary packet from when Mr. Moore's TDC number changed to 663, correct?

A. Correct.

Q. So that would indicate it's after he was placed on death row.

A. Yes, sir.

Q. Okay. Okay. Now, this is—can you read the date on there?

A. January 29th, 1984.

Q. All right. Offender Bobby J. Moore. Says: Psychological review committee, correct?

A. Correct.

Q. All right. Now, rather than read this entire document into the record, which anyone is welcome to look [120] at, let me summarize and you tell me if my

summary comports with what you read: That on January 29th of 1984, they administered a WAIS-R full-scale IQ of 71, placing Mr. Moore within the lower range of normal intellectual functioning. His MMPI profile revealed a protocol that was generally valid with scaled elevations on the psychotic scale, not inconsistent with ethnic and cultural biases of the instrument, chronic personality aberrations, unremarkable mental history, he's generally rational, logical with appropriate responses. Is that a fair summary of this, in your opinion?

A. I think that's almost verbatim what they wrote.

Q. Okay. All right. Now, can you read the date on this?

A. December 1st, 1983.

Q. Okay. And it's a social summary.

A. Yes, sir.

Q. Now, in fairness, what this says at the top is: A social summary is a document completed on all newly received inmates who are identified as probable special needs inmates during the course of the diagnostic process.

A. Correct.

Q. All right. Here's a section where they ask him about criminal history. I know it's small. I'll try to zoom in a little bit.

[121] A. That's okay. I can see.

Q. But I would like for you to read the top line of that.

A. On the advice of his attorney, Inmate Moore preferred not to discuss his present offense during the social services interview of 11-18-1983.

Q. How does the fact that Mr. Moore declined questioning on the advice of his lawyer play into your analysis of mental retardation?

A. It's just one more piece, that he has the ability to understand instruction and conceptualize it and act upon it.

Q. I would like to draw your attention now to State's Exhibit 26. It can fairly be described, I suppose, as disciplinary, library logs and commissary records.

A. Yes, sir.

Q. On page 81, starting on page 81, these look like pages that you've seen before, right?

A. They are.

Q. Okay. So, is this pretty fairly summarized as kind of an offense report within the TDCJ prison? See at the top where it says: Offense description?

A. Yes.

Q. And when somebody does something wrong, they generate a report, right?

[122] A. That's correct, yes.

Q. All right. So, this is kind of an offense report, for lack of a better word, from—where is it? Up here. Can you read that date right here?

A. It's 8-12-1992.

Q. Okay. And the description is that on the date and time above, on this particular row, Inmate Bobby James Moore was ordered by Officer Duff to mop up

some oatmeal in the mainway and the inmate failed to obey the order, right?

A. Right.

Q. Do you remember reading—I think it's eight pages, I think, pages 81 through 88—concerning this disciplinary issue, refusing to mop up oatmeal?

A. Yes.

Q. All right. Can I fairly summarize that—tell me if I'm wrong—that Mr. Moore was ordered to mop up some spilled oatmeal and he responded, I don't have to do that because I'm not a hall porter; I'm a death row porter, so that's not my job. Is that a fair characteristic—characterization, I'm sorry, of Mr. Moore's side of this?

A. Yes.

Q. Would that be yet another factor that you would consider as far as his ability to exercise adaptive skills?

A. Yes.

Q. If you would, please, if you look at the top, I [123] think you can see the title of this form as well as the date off to the right. Can you read that into the record?

A. Sure. It's a disciplinary record and it's January 23rd, 1987. It's the Ellis Unit. Excuse me.

Q. Okay. This one I'm just going to read into the record. On January 22nd of '87 at approximately—

THE COURT: Don't speed through it, though. The poor court reporter.

MR. PEEBLES: Oh, sorry. I forgot we have a court reporter, who's very upset with me.

MR. MCCANN: Your Honor, prior to this going, we're going to read it into the record, is there a second page to this?

MR. PEEBLES: On this one? Yes.

MR. MCCANN: Okay.

MR. PEEBLES: It's actually similar to the last instance where this is the front page of the report and then the whole kind of investigation goes on for a few pages, so.

MR. MCCANN: That's fine. We're just reading the top portion then?

MR. PEEBLES: Yes.

MR. MCCANN: Okay.

Q. (BY MR. PEEBLES) So on January 22nd, 1987, at approximately 4:20 PM, inmates on J-21 were brought down to [124] the day room and told to sit down and face the wall. Inmate Moore, Bobby, jumped up in the day room, yelling, Fuck this; we don't have to do this. Inmate Moore was trying to get the other inmates to join in. I ordered Inmate Moore to sit down and be quiet. Inmate Moore refused, saying, No, we don't have to do this. At this time I left Inmate Williams—I'm sorry. At this time I left Inmate Williams and walked over to Inmate Moore. At this time Inmate Moore turned and went back to where he had been sitting. I once again ordered Inmate Moore to sit down and he refused. At this time I grabbed him by both arms and placed him on the floor facedown.

The portion that I want to direct your attention to is the area where it says, We don't have to do this; Inmate Moore was trying to get the other inmates to join in. How might something like that demonstrate

Mr. Moore's ability to use adaptive skills within the prison?

A. It's social skills as far as trying to influence other people, so it falls within that domain.

Q. Again, I guess just to kind of speed this along, I'm going to refer to the same exhibit. Pages 210 to 216 reference another disciplinary incident. Focus here on June 24th, 1983. And it reads: At approximately 7:45 PM on the above date, I ordered Inmate Moore, Bobby, to return to [125] his cell after showering. Instead Inmate Moore stopped at 3 Row 3 Cell and began talking to an inmate. I again ordered Moore to go to his cell but the order was ignored. After being ignored a third time, Inmate Moore came back to the shower and said, You can't tell me what to do. Come on out from behind those bars and make me get in my cell. You ain't man enough to put me down.

As I was making a security check at 8:20 PM, Inmate Moore said, You get out from the front of my cell, you motherfucker. I wish these bars weren't here.

Having sat through testimony now for a couple of days, you heard us discuss susceptibility, gullibility versus standing up to authority.

A. Correct.

Q. Which of those two categories would this fall in?

A. It's the ability to stand up to authority.

Q. Okay. And then I also had given you a very voluminous package of health records from TDCJ, right?

A. Yes.

Q. Without belaboring the point, can you summarize for the Court, just generally speaking, what your

impression was of reviewing the health records that I gave you?

A. The ones, of course, I was most concerned about were in mental health records. It does appear that—I'm sorry. It does appear that throughout his stay, he has had [126] some withdrawn behavior that is reflective of depression. In 2005 they indicated he had written a suicide note. He denied it, that he did. He has refused treatment. They've never officially diagnosed him with a mental condition but—as far as, you know, depression or schizophrenia or anything like that. They document that most of the times his thought processes are logical and coherent but I do think that there has been a history of somewhat withdrawn and depressive behavior, which is kind of demonstrated earlier in his life as well.

Q. Thank you, Doctor. The next area I'd like to talk to you about are some photographs that were taken a little over a month ago in Mr. Moore's prison cell. And you've seen those, correct?

A. I have.

Q. Just generally speaking, State's Exhibit 31, if you can kind of see that through the glare, this is just a packet of handwritten letters. Is that a fair assessment?

A. Yes.

Q. Do they all appear to be in the same handwriting?

A. They appeared to be when I reviewed it, yes.

Q. Okay. And it's about 64 pages total.

A. Correct.

Q. When you discussed earlier your Flesch-Kincaid?

A. Yes, that's the readability score.

[127] Q. Are these the kind of things you look at to make that determination?

A. I did.

Q. Okay. Explain again what that readability score means.

A. Anybody can do it on the computer. It's on Microsoft Word. It is the—it takes the average number of words, the average number of syllables and divides it and there is a readability score that is produced and that is what is used for most journals, publications for the public. This has been around for several years and it was initially developed through the Army.

Q. Did you also see a—I guess I call it a composition, book? It's many, many, many pages long, appears to all be handwritten throughout, using the same handwriting throughout.

A. Yes, sir.

Q. There was some concern or some intimation that perhaps this writing was not Mr. Moore's writing, that he was simply copying down what someone else may have written?

A. Correct.

Q. Right? And to be fair and honest to everybody in the room, are you convinced that every piece of writing in this packet is the product of his independent thought?

A. No, I'm not.

[128] Q. So, some of these things might have been well-copied by him?

A. Certainly, yes.

Q. Correct? But to just maybe use a couple of examples here and there, this is, I guess—you can't see that but page 29 of this discusses a death row visit, being put in handcuffs, things like that. Do you vaguely recall that?

A. I do.

Q. On page 24 of this exhibit, describe for the Court what that is right there.

A. Somewhere he was either given information, read information—this is a normal distribution of IQ scores. This is very standard as far as the percentage of the population and what each IQ score means. This is very similar or—it's exact to the Wechsler Scales and how it is defined with a deviation of 15.

Q. So would this indicate to you that, from whatever source, Mr. Moore is looking into IQ scores from his prison cell?

A. Yes.

Q. And again, in light of the statement that perhaps this is not Mr. Moore's writing, that someone else wrote these and he was copying them, do you see this line right here?

[129] A. I bought myself a watch?

Q. Yes.

A. Yes, sir.

Q. Do any of the photographs that—I mean, I understand watches may be common throughout the prison.

A. Yeah.

Q. But within State's Exhibit 35, which is a collection of photos of his actual cell, there is a photo showing a watch in there, right?

A. Correct.

Q. State's Exhibit 29. Sorry. 29. This exhibit contains a collection of photographs of various newspaper articles that were found within Mr. Moore's prison cell.

A. Correct.

Q. Have you looked at these?

A. I have.

Q. And some of them purport to talk about death row cases, right, winning an appeal?

A. Yes, sir.

Q. Here's another one, winning an appeal. In fact, this one indicates that there's been some underlining of text.

A. Yes, sir.

Q. Is that specific only to this document or was underlining text something that you found common among lots [130] of these documents and books?

A. It was fairly common within the documents and books that Mr. Moore would underline passages that were important to him.

Q. Okay. In your general experience and history, the fact that text is underlined means that somebody, whoever's underlining it, must be reading it and comprehending what it says; is that fair?

A. I'm assuming they're reading it, yes, and the assumption follows that they comprehend.

Q. At least whatever's being underlined was important to them at that time?

A. Correct.

Q. State's Exhibit 28 shows what?

A. Books that Mr. Moore has in his cell.

Q. Okay. And if we flip through State's Exhibit 28, we'll see that there's a photograph of each book; for example, the interior of that book says what?

A. It's his name, his inmate ID and the date.

Q. And within some of these, we find the same type of notations or underlines or highlights, don't we?

A. Yes, sir.

Q. And I'm not necessarily pointing to the context here of what's being highlighted, just so much the fact that someone is reading this, comprehending and underlining the [131] portions that are important to them at the time, right?

A. Yes, sir.

Q. There's a couple of other exhibits with respect to photographs. I'm not going to put them on the overhead but one of them is a calendar from 2012 to 2013.

A. Yes.

Q. And the other one is a calendar from 2013 to 2014.

A. Yes.

Q. Those would be State's Exhibits 33 and 34, respectively. Just generally speaking, did you find anything in these calendars that would assist your determination of whether or not he's mentally retarded?

A. He made notations on the calendars, understood months, it appeared, and he was able to do testing that demonstrated that understanding when I saw him as well, and there's a lot of writing within some of the calendars as well.

Q. Do any of them have contact—address books or anything like that?

A. Yes, in the back of it there's a lot of contact information with people's names, address, phone number.

Q. All right. Did those appear to be appropriately filled out?

A. Yes, they did.

Q. The last section I want to go into with you is some [132] of the courtroom-related exhibits. Did you review an exhibit, particularly State's Exhibit 1, in which Mr. Moore submitted a typed *pro se* motion for a new trial; specifically referencing details from his trial?

A. Yes, sir.

Q. Okay. And in fairness, if it's typed, do you know for certain that Mr. Moore is the one that typed that?

A. I don't. He told me that he does not know how to type. So, I don't know.

Q. Okay. Nonetheless, it was submitted; it was in his name, right?

A. Correct.

Q. Did you review State's Exhibit 2 here, which, for purposes of—well, the original trial record would be in the first clerk's record at 149 to 151. Now, this purports to be a *pro se* handwritten motion for access to the record.

A. Correct.

Q. Statement of facts and transcript, right?

A. Yes, sir.

Q. Is this the handwriting which is somewhat consistent with everything else that you've seen in this case?

A. It is.

Q. And this is submitted in the name of Bobby James Moore, correct?

[133] A. Correct.

Q. Did you review what's called a motion to suppress hearing where there was a little hearing and the parties in court argued over whether or not Mr. Moore's confession was legally obtained or if it was forced out of him?

A. Yes.

Q. Remember that?

A. Yes, I do.

Q. Okay. From your recollection, was Mr. Moore able to testify in that hearing in a somewhat coherent fashion?

A. Yes. I mean, he was able to withstand both direct and cross-examination.

Q. And Mr. Moore, in fact—State's Exhibit 4 is a statement purportedly from Mr. Moore bearing his signature at the bottom which was admitted at trial as a confession from Mr. Moore and is your recollection of the testimony that the detective that took this said, I typed it based on what he told me?

A. That's correct, yes.

Q. Essentially his words?

A. That's what the officer said, yes.

Q. Now, I want to just take a little bit of time with this, State's Exhibit 5. State's Exhibit 5 is the testimony from the original trial. What is the—can you read the date of this trial here?

[134] A. I'm not seeing it. It's July, 1980.

Q. 10th of July, 1980.

A. 10th. I'm sorry.

Q. Okay. Now, in this exhibit, there's some page numbers here in the bottom left.

MR. PEEBLES: Judge, and for purposes of the record, I'm going to refer to the page numbers in the bottom left of this exhibit and I'll also indicate the line numbers on those pages. So, I have no objection—I don't know if Mr. McCann wants this, but when I'm just reading this, I can agree not to have it recreated by the court reporter. I don't know if you want to do that.

MR. MCCANN: Your Honor, if it's okay, why don't we just recreate it as we go, that way when we cross, it will make sense to someone else reading it.

THE COURT: Okay. That's fine, that's fine.

Q. (BY MR. PEEBLES) Okay. I apologize. I'm talking about State's Exhibit 6 here, same date, the 10th of July, 1980. On page 1810, and I'm going to read from line 3 through 24, and this is the defense lawyer questioning Mr. Moore while he's on the witness stand.

A. Yes, sir.

Q. *QUESTION: Now, you-all had discussions about this case all along the highway; is that right?*

ANSWER: Yes.

[135] *QUESTION: Now when you got here in Houston, did the officer put you in jail and take you to a little room and interrogate you?*

ANSWER: They took me to a little room and told me that I may as well sign the statement since these dudes had identified me being with them. I told them I wouldn't. The one—so he told me I was going to make it or else I would—it would be up to him to make this statement on whatever it called for me to make the statement.

QUESTION: So what started happening to you at that point?

ANSWER: Well, one officer, he told one officer to leave the room and go do something. I don't know what he went to do but he got to hitting me upside the jaw and everything and I still refused to sign the statement and everything, so he took me to another room where there was some typewriters and everything and asked me would I sign. I told him, no, I wouldn't sign it.

Now, on page 1812, at lines 2 through 10, it says:

QUESTION: Now, you've been in prison before, have you not?

ANSWER: Yes.

QUESTION: Is it or is it not—has it become—[136] *isn't it a code with people like you who have been in prison that they don't sign confessions, do you?*

ANSWER: No, I'm quite sure we don't. I wouldn't know how to because I have been to—before to jail. I know how they do things. I know I wouldn't sign no statement.

Now I'll show you page 1821, only to point out that we've now moved to cross-examination here. So, now, we're being—Mr. Moore is being questioned by the prosecutor, something that he would not likely have been prepped for. I'll read from page 1830, line 4 through page 1832, line 13:

QUESTION: Why did you leave your grandmother alone that night? Her daughter—

ANSWER: Her daughter was supposed to be coming over there.

QUESTION: You left her there without even seeing her daughter was there?

ANSWER: She called and she supposed to come by.

QUESTION: How far away does the daughter live, sir?

ANSWER: Coushatta.

QUESTION: She's right there in town?

ANSWER: Right close there.

QUESTION: You came back with your sister close to [137] *the 24th, 25th, 26th or 27th. You don't really remember what day it was.*

ANSWER: Well, like I—have—I'm sorry. Well, like, it have to go between the 26th or 27th at the most.

QUESTION: And you were back how many days before you decided that you had to go back with your father?

ANSWER: Well, we left the same day—on that same night, sir.

QUESTION: That would be the 26th or 27th you went back with Bobby White?

ANSWER: Right.

QUESTION: You heard him testify specifically about meeting your father, Junior Moore, there in a liquor store. Do you recall that?

ANSWER: Yes.

QUESTION: He was right about that, wasn't he?

ANSWER: Right.

QUESTION: And he was right about the trip to Louisiana on that day—whatever day it was—but I think it must be your position he was mistaken about having another passenger in the car?

ANSWER: Well, my little sister was there.

QUESTION: She was there with you?

ANSWER: Yes.

[138] *QUESTION: Was she at the liquor store with you?*

ANSWER: No. We went by the house and picked up my little sister.

QUESTION: He took you there. What day would this be, Mr. Moore?

ANSWER: This would be the 26th, that evening.

QUESTION: The evening of the 26th you now go back with White. Are you sure about that?

ANSWER: I'm positive.

QUESTION: You go back with your father and your sister and the plan was to leave your sister there; is that right?

ANSWER: Right.

QUESTION: How long was she going to stay there?

ANSWER: Well, we didn't make no decision. We just was going to take her out there and if she decided to stay longer, she stay longer.

QUESTION: Did you say that you came back from Louisiana with your sister on that very same day, on the day Bobby White took you and your father and sister back?

ANSWER: Yes.

QUESTION: Made a trip here that day, a trip back over there the same day? Are you sure of that?

ANSWER: I'm positive.

[139] One last little excerpt, page 1836, all on this page, lines 16 through 25.

QUESTION: You had known him since you had been in the penitentiary.

ANSWER: I met him in prison.

QUESTION: You knew who he was.

ANSWER: No, I didn't know him.

QUESTION: Well, how did you meet him and not know who he was?

ANSWER: Common sense tells you you going to meet different people in the penitentiary.

QUESTION: You met him but you never called him by name?

ANSWER: Called him by his name, which was Tony.

Granted, that's not his entire testimony I just read but those are excerpts which probably assisted you in your determination of his mental functioning during the trial; is that fair?

A. That's fair.

Q. Okay. What's your reaction to Mr. Moore's ability to testify in this manner in 1980?

A. As I stated before, he was able to process questions, respond to questions, and it's a pretty stressful experience for most people to testify, especially when you're being cross-examined, and he was able to do that [140] without significant difficulty. He was able to conceptualize the process and he could form exculpatory responses or explanations—alternative explanations, I should say, which, again, indicate an ability to process information, manipulate that information and form a response.

Q. I'll speed it up here a little bit. In State's Exhibit 7, did you review court records where the defense wanted to stipulate to some criminal history and the Court engaged in questioning specifically of Mr. Moore to satisfy itself that Mr. Moore was aware of what was going on and it was his free and voluntary choice?

A. Yes. I want to make sure I'm answering you correctly. You're talking about when they were going to put in extraneous offenses?

Q. They were going to stipulate, yes, to his previous criminal history

A. Okay, yes.

Q. Did you see in State's Exhibit 8, for example, some *pro se* handwritten letters to the clerk purportedly from Mr. Moore, saying that his lawyer, Al Bonner, refused to keep him informed about the case and that he was indigent and that he wanted a copy of his record?

A. Yes.

Q. Did you see a follow-up letter, State's Exhibit 9, [141] where there's another handwritten letter purportedly from Mr. Moore to the clerk saying that he hadn't heard any response and he was asking to get his motion before the Judge?

A. Yes.

Q. Did you see in State's Exhibits 10 and 11 numerous *pro se* motions, some of them handwritten, a lot of them typed?

A. I did.

Q. Do you remember in State's Exhibit 13 there was a hearing on Mr. Moore's request to represent himself?

A. Yes, sir.

Q. Do you recall the Court questioning Mr. Moore at length about his intent and his problems with his lawyer?

A. I do.

Q. Was there anything about what you read that suggested to you that Mr. Moore was unable to understand what the Court was asking him?

A. I believe he was able to understand what the Court was asking him and responded appropriately. Some of the legal issues, he had difficulty understanding.

Q. Fair enough. And then in State's Exhibit 20, contains the testimony of DeeDee Halpin?

A. Yes.

Q. Do you recall DeeDee Halpin's testimony?

[142] A. I do.

Q. What did you find significant about Ms. Halpin's testimony?

A. As with both of the experts, they were attributing his withdrawn behavior to emotional problems and that was not appropriately recognized or appropriately dealt with in his childhood and neither she nor Bettina Wright determined he was mentally retarded. His ability—abilities, I should say, his adaptive abilities have progressed since he's been in prison, indicating a strong ability to learn and that was reflected in their testimony.

Q. Bettina Wright's testimony being in State's Exhibit 21.

A. I'm sorry, yes.

Q. Okay. Do you recall reading the testimony from a witness named Jo Ann Cross? Jo Ann Cross was a London lawyer whose mother had been a pen pal of Mr. Moore.

A. Yes, I do.

Q. And just to summarize very briefly for you, you recall Ms. Cross saying that in the beginning Mr. Moore couldn't hardly read or spell as much but it's really developed, his spelling, his grammar, his language. Her mother and Mr. Moore would discuss books and newspapers that the mother would send to Moore and when her mom died, Mr. Moore wrote to her about her mother's death. Ms. Cross [143] concluded that Mr. Moore absolutely had been able to understand and comprehend. His emotions are appropriate and he had grown immensely as a person. Is that kind of a summary of what you remember?

A. Yes, sir.

Q. Okay. So I think I'm pretty much done with you, which brings us to the million-dollar questions.

A. Uh-huh.

Q. Stepping back and looking at certainly your specific testing of Mr. Moore but in addition, the case as a whole, what's your ultimate conclusion on whether Mr. Moore's mentally retarded?

A. I think there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning. I do not believe—I do not have the data to support a diagnosis of mental retardation, simply because the adaptive functioning, I think, has been too great. Even before prison, I mean, there's indications of adaptive skills. So, I just—I do not have the adaptive deficits for a diagnosis and the only IQ testing—valid, full-scale IQ testing we had was once in childhood, twice at TDC and then the one that I did.

Q. Is there anything that you—that I have failed to ask you that you find important or relevant to your ultimate opinion that we need to inform the Court about?

[144] A. Not that I can think of right now.

* * *

Q. All right. Let me go over a couple of things. First off, we've actually talked before, haven't we?

A. We have.

Q. And we sent our reports to you as soon as they were physically able or ready for your review, right?

A. I have full faith you sent me everything you have.

Q. Okay. Hid nothing from you. In fact, we [145] encouraged dialogue with our experts and with my staff; is that fair?

A. Absolutely, yes.

Q. Okay. And I want to go back over some things and I just want to make this clear in the record. Is it fair that you don't believe you have enough to make a call one way or the other as to Mr. Moore's mental retardation?

A. I believe that I don't have enough information on his adaptive deficits or adaptive—I do not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis.

Q. Okay. Let's go through some of the record and if some of the assumptions that I think you've been working under were to change, whether that would change your diagnosis. Is that fair?

A. Absolutely.

Q. Okay. Let's go back and start with just a quick summary of the scores.

A. Okay.

Q. That you had. You had an IQ test that you gave to Mr. Moore that scored at a 57?

A. I believe it was a 59 and then I Flynn adjusted and it would be 57.

[146] Q. And just so we're clear, you agree with the Flynn Effect as a principle of adjusting scores and norms?

A. Absolutely.

Q. Okay. So, the Flynn-adjusted score was 57. The standard score—I was correct on this—standard score, not raw, was 59?

A. That's correct.

Q. Okay. Both those scores would, under any diagnostic criteria from a DSM-III through V or the AAIDD—I said it right this time, I think—would qualify as in the range of mental retardation; is that fair?

A. Absolutely, that's fair.

Q. Okay. That score is also consistent with an admittedly earlier and perhaps less useful IQ test, the Slosson that he was given when he was 13, which was also 57.

A. Yes, it is consistent with a Slosson Intelligence Test.

Q. And we agree—I think our own expert agreed that that is not the ideal test, that the best standard is the one you administered; is that fair?

A. I believe that to be true, yes.

Q. Okay. The test that you did administer, you did not complete all of the sections of the test; is that correct?

A. No. You're talking about the Wechsler Intelligence [147] Scale, correct?

Q. Yes.

A. No. I administered all of the nine subtests plus an additional comprehension subtest.

Q. Did I misunderstand when you said you had time to administer six or was that the WRAT that I heard?

A. No, I'm sorry. That was the memory scales. There were two subtests on the memory scales that I was not able to complete, which was a separate test.

Q. Ah, fair enough. Okay. So, you feel comfortable that you administered the full range on the Wechsler that you did?

A. Absolutely, yes.

Q. And you said that on the effort test that you gave, the norm of 45 as a score was slightly above what—the 40 that Mr. Moore gave you on two different occasions; is that correct?

A. The score is what you're talking about?

Q. Yes.

A. Yes.

Q. Okay. So you could not say that he was not—let me rephrase that. That's not, in your mind, proof of one thing or the other. It's simply an indicator that he might not have been performing at his best that day?

A. On the Test of Memory Malingering I think is what [148] you're talking about.

Q. Yes?

A. Yes. There is a moderate indication on two of the trials that there's not full effort. It's not extreme. It's not over the top. It's a moderate indication.

Q. But you yourself said that a fly on the wall would indicate that he was cooperating and was understanding your directions. Is that fair?

A. That's fair, yes.

Q. Okay. Looking at the two tests in between your tests and the Slosson, which are both in the 50s, okay?

A. Yes.

Q. There was an IQ test that was administered later at school?

A. Correct.

Q. And then one that appeared to be administered as a Wechsler-R—

A. Correct.

Q. —in TDC. You did not see any of those actual documents or raw scores, right?

A. I did on the Wechsler.

Q. Ah, okay.

A. There was two in TDC, two Wechsler tests in TDC.

Q. Okay.

A. One they just make a notation of it, okay, and then [149] the second one is the one, I believe, in 1989 where I actually had raw data.

Q. Okay. And that raw data, in '89, was that—both of those scores came down to what in the—if you have to check your notes, that's fine. I just want to make sure. But all of those scores came down to scores, whether Flynn adjusted or not—or let me put it this way. When you Flynn adjusted those scores, they came down to a scoring range that would be within the range for mental retardation?

A. That's correct.

Q. Okay. So, there is not a single score properly reviewed that indicates anything but functioning in

the mentally retarded range whether, you know—and I realize this is an odd phrasing but—high range of mental retardation or moderate or mild.

A. Right. All of the ones that I considered valid, there is this range where he could fall within the borderline range into the mild mentally retarded range.

Q. Okay.

A. With the Flynn-adjusted effect.

Q. Okay.

A. But you have a standard error of measure on all of those tests.

Q. Right.

A. And we give it a general plus or minus 5 but it's [150] actually more specific than that. You have to look at the statistical tables but plus or minus 5 for purposes of ease here.

Q. Okay. And looking at this, I think where your hesitation, if I understand it right, is on evidence of the adaptive deficits; is that fair?

A. Yes. And evidence of adaptive abilities.

Q. Okay.

A. Yeah.

Q. So, let me go through some of the things that you've talked about here and follow up on this and see if it would change your view on some of it, okay?

A. Sure.

Q. In terms of adaptive skills, you counted reporting that he played pool and mowed lawns for a living as evidence of adaptive skills; is that fair?

A. Yes, sir.

Q. So, let me take a general question here first. Can intellectually disabled people handle physical tasks?

A. Of course they can.

Q. Okay. Would you consider pushing a lawn mower a physical task?

A. Of course I do.

Q. Would you consider playing a physical game such as pool a physical task?

[151] A. Yes.

Q. Okay. And let me go further on that.

A. Okay.

Q. Do you know how to play pool?

A. I don't.

Q. Does anyone in your family know?

A. Yes.

Q. Okay. Who taught them?

A. My grandfather taught my father.

Q. And you weren't around to—obviously to see that happen, correct?

A. No, I was not.

Q. Okay. So, you don't know who taught Mr. Moore to play pool?

A. Of course not, no.

Q. You don't know, other than the fact that he actually says that he played pool, you don't know—

really there's no objective way to know how well he did it; is that fair?

A. That's absolutely fair.

Q. Okay. And you don't know if someone else was with him when he was playing and suggesting shots, do you?

A. No, I do not.

Q. Okay. In terms of the lawn mower, do you have children of lawn mowing age?

[152] A. Beyond that, yes, I do.

Q. Ah, okay. And did they used to do yard chores when they were younger?

A. Yes.

Q. Okay. At what age did you let them run the mower?

A. I let my daughter run the mower when she was about 15, 16.

Q. Okay. And not to be sexist, would you have let your—if you had a boy child, would you have let him run it around 12?

A. No.

Q. No?

A. No.

Q. Absolutely. There you go. I did it myself when I was 12 for that, but on a press-start motor, other than making sure that your lever's engaged, would you say there's a lot of skill in that?

A. No. And let me be clear: I think a lot of kids mow lawns.

Q. Okay.

A. And I don't think that is indicative one way or the other that he is or is not mentally retarded but it is a skill that, when you look at the totality is what I'm talking about.

Q. Okay. But it's a low-level skill; would you agree [153] with me on that?

A. Of course it is, yes.

Q. And let's talk about the fountain boy report. Even the equivalent of the McDonald's assistant manager that wrote up this report, okay, said that Mr. Moore had—he had a choice of several blocks. He said he had limited skill as a fountain boy. That means you're running a mop and a pull lever.

A. You're talking about the K-Two (sic) Restaurant?

Q. Yes. That means you're—I mean, a fountain boy runs the lever, the sink and mops?

A. Sure. They have very basic, menial skills, yes.

Q. And that guy, that, you know, equivalent of a McDonald's assistant manager, sat there and said that Mr. Moore had limited skills. Is that fair?

A. Yes, absolutely.

Q. Okay. So, again, not any evidence of higher level functioning?

A. No.

Q. Okay. Now, the fact that some school officials, back when Mr. Moore was actually in school, before he was tossed out, noted problems, although that's a good warning sign, okay, the fact that they didn't diagnose

him formally in the early and mid '70s as being retarded, is that really evidence that he's not?

[154] A. No. You would have hoped, if it were true, that there would have been some indication and he would have been diagnosed and intervention would have taken place. Certainly there are instances where you have to go back and retrospectively diagnose some day because there's a failure.

Q. Let's talk about that. It's pretty clear from the testimony that we all heard that the failure lay with his father, isn't it?

A. Well, I mean from the testimony we heard, his father would not allow intervention in his life.

Q. Okay. So, a person goes undiagnosed through no fault of their own. Is it fair to say that in many cases of intellectual disability that there's not necessarily a cause-effect relationship that you can find. I mean, sure, it would be great if you had one but is it fair to say that you are often presented with a—what they used to call a fait accompli, something that's clear but you don't know the cause?

A. The vast majority of mental retardation we do not know the cause.

Q. Okay. And we hope that that's going to change through research and through documents but right now you're basically dealing with the fact of its existence in most cases as opposed to rooting out the causes?

A. Now you're talking about for an individual specific [155] person the cause, correct?

Q. Yes.

A. Yeah, I mean there's some genetic testing. That's all very much, you know, in the research stages, that's correct.

Q. And there's actually some strong research now about fetal alcohol syndrome?

A. Absolutely, yes.

Q. And one of the primary reasons we now warn pregnant women not to drink during pregnancy?

A. Correct.

Q. But that's ongoing and for the most part, someone of Mr. Moore's generation would not have had a clear cause-effect?

A. No, not unless he had, you know, some of the characteristics of Down Syndrome, correct, or some other genetic condition that physically you can see.

Q. Okay. And looking at that—despite that, you know, commonality, you identified several risk factors that were present, including some indication of a possible genetic link and possible toxic exposure, all of those things actually you did see?

A. That's correct. There were risk factors, no doubt.

Q. Okay. In terms of adaptive deficits, let's take a look at some of the stuff that we talked about in terms of [156] the prison, okay? And I want to make sure I understood what you were saying. The disciplinary reports that Mr. Peebles read into the record and showed you, okay, indicated Mr. Moore getting in trouble, didn't they?

A. Some of them, yes.

Q. Okay. Well, he was written up for one?

A. Correct.

Q. For refusing an order?

A. Yes.

Q. Okay. I know my nephew has been adamantly refusing to do certain things since he was 2. That's not really an example of a skill, is it?

A. Only inasmuch—I mean, it's oppositional behavior and, you're right, 2-year-olds can exhibit oppositional behavior. 80-year-olds can exhibit—it's not specifically indicative of anything except oppositional behavior. Some of the issues with those who have intellectual disability or mental retardation is the complacency and the failure to stand up for themselves. And I think that—and that's just a small piece of my opinion but certainly he has that ability at times.

Q. Okay. But we don't know the context or the backstory of that, neither you nor I, nor, frankly, anyone, since—whether he'd been having a difficult day or personal problems with that particular security officer, do [157] we?

A. No, we absolutely do not know.

Q. Okay. In regards to the testing you did on the math and the examples of the commissary sheets being filled out?

A. Yes.

Q. I want to put something to you, okay? If you look at the commissary sheet as either one math problem or arithmetic problem, okay, more accurately, of adding up how many items you have, then if someone's given that math problem the day before and has 24 hours to work on that math problem, okay, or arithmetic adding problem—it's not even subtraction; it's just adding, okay?

A. Correct.

Q. Would you expect a reasonable rate of success even from someone with intellectual disability, provided they had those skills?

A. Provided they had math skills.

Q. Well, at least arithmetic skills. They could add digit numbers up to, you know, dollars and cents which are two digits past the decimal point?

A. You're asking me if they had 24 hours to calculate, would that be, outside of the range of someone who had those skills?

Q. Correct.

[158] A. No, I do not think it would be.

Q. And you saw Mr. LeBlanc come in and testify that he takes things out of the package and shows each inmate.

A. Sure, uh-huh.

Q. So, there's a visual inspection with someone verifying that the item is there?

A. Correct.

Q. To aid the person.

A. Yes.

Q. Okay. And he also was very clear that he doesn't know whether or not anyone helped him—by "him" I mean Mr. Moore—with his math, does he?

A. As far as on the commissary slips?

Q. Correct.

A. No, he does not know.

Q. Okay. And I want to put that to you.

MR. MCCANN: May I approach the witness, Your Honor?

THE COURT: Sure.

Q. (BY MR. MCCANN) Okay. I want to show you State's 28 and State's 29 and I'm just going to come up and these are the pictures of books and passages and newspaper articles.

A. Yes, sir.

Q. That we have here. There's no indication of who [159] sent these items to Mr. Moore anywhere in these, is there?

A. Not that I'm aware of, no.

Q. Okay. And on newspaper articles, those would also likely be sent to him in mail, would they not?

A. I'm assuming, yes.

Q. Okay. So, you don't know in particular if he had a regular correspondent who did any of the underlining, do you?

A. No, I don't.

Q. You assumed that it was Mr. Moore?

A. I would assume that, yes.

Q. If it was not Mr. Moore, would that take away a piece of the pie that you were talking about?

A. It would.

Q. Okay. And let me also put to you that there are times when, at least for me when I was in law school and we still actually had books as opposed to iPads, where I would underline something I needed to review because I didn't understand it when I was in class. In particular for me, it was the rule against perpetuities,

which is a bizarre, strange thing about trusts and lives and being that I had to wrestle with. And I underlined that to look it up later and try to get someone to explain it to me that was smarter than I.

A. Okay.

[160] Q. Is that also something that people do when they want to sit there and understand something?

A. Absolutely. Highlight, underlining, I mean, it's a basic learning or a pneumonic strategy that we all use to process and learn something that may be difficult for us.

Q. Okay. So, underlining, even assuming that it was Mr. Moore who did underlining, okay, wouldn't that also potentially indicate something he didn't comprehend?

A. Well, certainly it could indicate something he didn't comprehend but it's also something, when we're reading, we underline these things that we know ourselves that we want to go back and review, it involves processing and conceptualization to go back and do that. Planning, forethought, all of that stuff.

Q. And that's fair. I think we're perhaps—and I want you to understand that so many people are not as fortunate as you and some of the other folks who work in this field are, but it is not that an intellectually disabled person cannot process some things, if I understand the gist of this. It is that they process them at a rate so much more slowly than the rest of us that—is that a fair statement?

A. Yes. They process it more slowly and there is a asymptope to their acquisition level.

Q. Could you spell for the court reporter?

[161] A. (Inaudible.)

THE COURT REPORTER: I'm sorry. I couldn't understand you through your laughing.

A. Why don't we just say it? There is a level to what they can acquire as far as their intellectual abilities.

Q. (BY MR. MCCANN) Okay.

A. It's not that you continue to learn and continue to advance, so—

Q. There's a ceiling?

A. Sure, yes, there's a ceiling.

Q. Is that fair? Okay.

And switching gears again briefly, my grandmother used to underline passages of her Bible for her children and that was to inspire them. She used to underline Psalms.

A. Yes, sir.

Q. I think it's a fairly common practice among good grandparents to try and teach their wayward children and grandchildren better behavior. It failed with me but it was—worked well with my mom. Going down that route, would it also be possible that someone who sent someone a Bible would have underlined passages to help someone on death row get through the day?

A. Sure.

Q. Okay. And I want to also talk about some of the [162] testing that you did.

A. Uh-huh.

Q. You actually administered the Texas Achievement Test yourself, and is it TFLS? Is that correct?

A. Yes, we call—it's the Texas Functional Living Scales, yes.

Q. Thank you. Thank you. There are a lot of acronyms. I try to remember—

A. I know.

Q. You consider that a good, valid test, right?

A. Sure.

Q. In your handwritten notes, and if you have to check your test scores there, didn't you indicate that Mr. Moore was two and a half times below—two and a half standard deviations below the norm?

A. 2.5 standard deviations below the mean, yes.

Q. Okay. And in fact, one of those tests was a test for telling time?

A. Correct.

Q. And it actually was this basic. You have a clock with the hands drawn on it and he has to tell you what the time is and he got it wrong?

A. No, he could tell me the time. What he could not do or what he did not do was draw the hands of the clock correctly.

[163] Q. Fair enough.

A. Yeah.

Q. The inverse of what I just said.

A. Yes, he could tell the time.

Q. Okay. And looking at that, wouldn't that be consistent with someone who performs in the range of intellectual disability?

A. Someone, who could not draw the correct length of hands on a clock?

Q. Yes.

A. It could be.

Q. Okay. And someone who scored two and a half times the standard deviation below the norm would also be consistent with that, wouldn't it?

A. Could be, yes.

Q. Okay. In looking at memory, although they're—I think Dr. Anderson did some specific tests on memory and you had done some, too. They indicated that Mr. Moore's memory, although reasonably intact, was not high but probably low to average; is that fair?

A. Low average range, yes.

Q. Okay. So, in terms of inconsistencies between reports that are over a decade apart, is it simply a matter of memory sometimes that one doesn't remember something that one hasn't seen in a long time, such as your issue on the [164] thermometer?

A. That is a form—there's two different types of what we call knowledge. It's crystallized knowledge, just stuff that we know, stuff that we learn, and then fluid, which is the ability to process. Knowledge for words like that, it's rare to just forget it and not know what it is. I found that disturbing. I'll be honest with you, I did.

Q. Okay.

A. And that was just one piece of the—one piece of everything for me. And all of these are small pieces. It's the totality of it all that I was struggling with.

Q. Okay. And let me sit there, not to dwell on a word, but in terms of test taking—

A. Yes.

Q. If you or I took the SAT on any three or four given days, would it be fair to say those scores would vary considerably?

A. They would certainly vary. I don't know how considerably but we would have variation, absolutely.

Q. Okay. And would perhaps a mean of those scores be a more appropriate indication of our actual typical ability?

A. Yes.

Q. Okay. So, looking at the scores that you had before, would it be fair to say that a running mean of the scores, all the scores that you considered valid, would [165] place Mr. Moore in the mid to upper 60s for IQ?

A. Well, possibly. The problem I have is that the score I obtained on the IQ test, I did not consider that to be a valid score because we had some suboptimal performance. I think it's a little higher than that. I think it's higher than that.

Q. Higher than 57?

A I do.

Q. Okay. But that would still be consistent with mid-60s or upper 60s?

A. I would say upper 60s, upper 70s if you took the mean of the two that had been done—well, we could say three, the three that had been done that were valid, full-scale standardized IQ.

Q. Okay.

A. We could get somewhere between the upper 60s and the 70s that would be the mean, I would suspect.

Q. Okay. Let's do it out, if you can. The first one was the 57 on the Slosson?

A. I'm not even considering those.

Q. Okay.

A. Those tests are not valid to me.

Q. Gotcha.

A. I just do not have the validity to—I'm talking about the Wechsler Scales, okay?

[166] Q. Okay. On the Wechsler's?

A. Right.

Q. You feel, though, that even the running mean of those would be within the mentally retarded range?

A. They probably would be, yes.

Q. Okay. That's fair. And in terms of looking at some of the other State's Exhibits—let's talk about State's Exhibit 5, which was the testimony at the hearing.

A. Yes, sir.

Q. You've testified with lawyers before, right?

A. Oh, yes.

Q. Yeah. I'm sorry for you. We spend time working with you to understand the nature of your testimony, right?

A. Not usually. Not with me. But with your defendants, you should.

Q. Okay. So a person who was examined by his own lawyer would logically have had some practice at that before appearing on the stand, right?

A. Sure, yes.

Q. Okay. Would you think it would be a good practice for a defense attorney to run a fellow that was going to be on the stand through some practice cross-examination, too?

A. Yes, I do.

Q. Okay. And since you earlier said that Mr. Moore's memory was pretty much intact.

[167] A. Yes.

Q. Okay? Not phenomenally or, you know, like Kreskin or anything, but pretty much intact, would it be fair to say that when the prosecutor crosses him on his memory, that he's just recounting what he said and did, right?

A. Relying upon his memory.

Q. Right.

A. Yes.

Q. Okay. So, and people with intellectual disability can have reasonable memories, right?

A. Some do, yes.

Q. Okay.

A. Often it's impaired but some do.

Q. Okay. And let's talk about that, too. People with intellectual disabilities are not uniform, are they?

A. No, there's not a unitary—a unitary peg that they fit into.

Q. Okay. And people with intellectual disabilities can show competence in some areas and incompetence in others?

A. Just like all of us, yes.

Q. That's very true. And the pieces of the puzzle that you have looked at, in terms of some of those pieces, if one assumed that he did not do the underlining on the books or the articles, okay, and if one assumed that his [168] skills were always fairly low-level on adaptive behavior, in the job and, you know, the types of things that might have made him some money to survive, and if one assumes that really it's not showing ability to influence anyone where you get yourself in trouble and written up, that's not really mastering the system, would that change your perception at all?

A. If all of that were accurate and true?

Q. Yeah.

A. It may to some degree.

Q. That's fair. I'm going to give you a chance to explain that because I know it's fair. This has been—the nice thing about working with this is we're just trying to get to a truth here.

A. Sure, absolutely.

Q. Or as close as we ever can.

A. Yeah.

Q. But looking at some of this, too, I want you to think about some things in terms of literacy and legal knowledge and skills.

A. Uh-huh.

Q. There were a number of what we would call *pro se*, for yourself, for you, motions and things filed in Mr. Moore's case. There's no real proof that he did any of them on his own.

[169] A. No, I do not know that.

Q. Okay. And in fact, the typewritten ones, our best information is that he does not own nor does he know how to type.

A. That's what I've been told.

Q. Okay. And you heard the testimony of Mr. Fronckiewicz who indicated that at some point there was another individual handling Mr. Moore's affairs?

A. Mr. Harris, I believe, David Harris is what he said.

Q. Harris, that's right, David Harris.

A. Yes.

Q. And looking at those things, if you were to learn that Mr. Moore did not file his own *pro se* motions or pleadings, would that be another piece of the pie that would perhaps alter your perception of his skills and abilities?

A. When you're saying he did not file them, you mean he did not have—

Q. He did not prepare them?

A. He did not write them?

Q. That's correct.

A. Okay. It may. Certainly involvement would still indicate understanding.

Q. Ah, I see your point. But do you have any evidence that he dictated those motions or directed them to-be done [170] at all?

A. No, I mean, there's some handwritten motions. He may have copied them. I don't know.

Q. Okay. You worked in the prison for a while, you said, right?

A. Not here in Texas. In Kansas, I did, yes.

Q. Okay. Did you work on a contract or for the system itself?

A. For the system itself.

Q. Were you familiar with the fact that inmates share pleadings?

A. Oh, absolutely, yes, I'm aware of that.

Q. Okay. And just as I might draw a picture, although horribly, that I saw and tried to recreate it, it is not a higher function to be able to copy a visual image, is it?

A. Depends on the visual image, but I mean—

Q. Okay.

A. It requires some motor skills, it does require some processing speed and it requires some abstraction. It depends on what you're asking. Are you talking about copying a motion?

Q. Yes.

A. —does that require? You know, it requires the ability to write.

Q. Okay.

[171] A. And it may require the ability or it does require the ability to kind of process the symbols on the page, whether you can read them or not.

Q. Okay. Would you say that copying a motion is something within the realm of many people with intellectual disability?

A. No. I'd say it's within the realm of some.

Q. Okay.

A. Some but not many.

Q. Okay. So, if someone else did it or gave Mr. Moore something to copy, would that potentially alter your—the taste of the pie?

A. Yeah, it takes away a piece of the pie, of course.

Q. Okay. All right. You know, one of the things that you had mentioned and I think one of the very obvious truths here is that being on death row has got to be fairly depressing for most people. But you don't have, on any of the records that are in the State's exhibits, there is not an actual Axis I diagnosis of depression, is there?

A. There is not, no, huh-uh.

Q. Okay. And the record that you did point to where he was withdrawn and clearly going through a difficult period was in 2005, wasn't it?

A. Yes, it was.

Q. So, eight years between then and the test you [172] administered and many years after—over a decade between the test the TDCJ administered and that episode; is that fair? In other words, in the '80s they tested him and you tested him in 2013. In 2005

he had a episode that could have been depressive, wasn't diagnosed that way but could have been.

A. Could have been.

Q. But clearly a decade or so in between these tests, right?

A. Yes.

Q. Okay. So, when you saw him, was there any indication of mental disturbance?

A. When you say "mental disturbance," you're talking about any type of, like, psychotic aberration, hallucinations, severe depression?

Q. Yes, yes.

A. I mean, his affect his flat. He seemed a little depressed. He denied it. We talked about it. He said he's had some depression in the past.

Q. Okay.

A. But was there overt and glaring mental aberration when I saw him on Sunday? No.

Q. Okay. Fair enough. And let me go back to the school days. Although clearly there would be reasons for any child to be depressed, given Mr. Moore's home, I think [173] all of us can agree that that was terrible.

A. If everything they said was accurate, it was terrible.

Q. Okay. He was not diagnosed with depression in school, was he?

A. No, there were indications of emotional disturbance, two specifically, and so people were recognizing that we had an emotional disturbance that was occurring. Unfortunately when Mr. Moore went to school,

not a whole lot was done at times when kids had emotional problems.

Q. And also in fairness, there was some indication that there was some stress about—during the integration of his other middle school.

A. Oh, yeah.

Q. Unfortunate, but nevertheless that could have also caused some difficulties for some kids, right?

A. Sure, I think in—yes, of course it could have.

Q. Okay. But looking at that, no contemporaneous diagnosis of something that would have directly affected his IQ scores then, was there?

A. No.

Q. Okay. And I guess this brings me back on this. Schools in general—and although I grant you that they try to be better about these things now—in general if—I [174] don't mean to personalize this. If this was a neighbor's child and the neighbor came to you and said, look, my kid's going through some difficulties, he got left behind this year, his father's been problematic, he's finally out of the house, the school says he's not retarded, would you accept that diagnosis without your own testing?

A. Without my own testing?

Q. Correct.

A. No, I would not.

Q. Okay. Do you think most schools have the staff that are competent to make these determinations? Not that they can't recognize warning signs but to make an actual diagnosis?

A. Are you talking about most schools now or then?

Q. I'll go with both.

A. Okay. I think now, yes, because they're better staffed. As a matter of fact, I think now too many kids are put in special education erroneously.

Q. Okay.

A. Okay? I can only speak from my experiences. I'm around close to the same age as Mr. Moore. My experiences when I went to school, there were special education classes, they were generally reserved—of course this was in Kansas, not in Texas—they were generally reserved for those kids who had what would be considered moderate [175] intellectual deficiencies. The mild ones stayed within the mainstream school and were slow. That's all I can tell you.

Q. Okay.

A. I'm sorry.

Q. So, I guess the answer would be nowadays, yes and then, no?

A. For the intellectual to mild, no, they would keep them in the mainstream.

Q. Okay. I also want to talk about planning and some things that may have gone into some assumptions about that and about abilities related to games, okay?

A. Did you say playing?

Q. Planning.

A. Planning. Okay.

Q. Planning. And let me talk about a couple of examples. There was a disciplinary sheet from one of the State's exhibits that Mr. Peebles read into where another inmate went into Mr. Moore's cell without

permission and Mr. Moore was written up but it was the other inmate, Inmate Swan, who said he went in to play dominoes; is that fair?

A. That's absolutely fair.

Q. So, Mr. Moore never said he went in to play dominoes, right?

A. I don't believe he did.

Q. The guard didn't say he observed Mr. Moore playing [176] dominoes, did he?

A. No.

Q. Okay. And when you're looking at a couple of the other things, certainly Mr. Moore did not get away with any of his oppositional defiant behavior in the disciplinary write-ups you saw, did he?

A. They rarely do.

Q. Okay. He was put on his face once. He was removed from privileges for another time.

A. Yes.

Q. Okay. So, in terms of oppositional—who was that fellow on *Leave It To Beaver?* Eddie Haskell-like qualities, not a smooth operator, Mr. Moore?

A. Well, I would assume not, no.

Q. Okay. And I also want to talk about some of the things in relation to skills and things that you may observe in people when they write. When was the last time you handwrote a letter?

A. December 24th.

Q. A Christmas card?

A. Yes.

Q. Okay. When was the last time you actually wrote a couple of pages on a piece of paper like this?

A. A letter?

Q. Yep.

[177] A. It's probably been three or four years.

Q. Okay. And nowadays we tend to send things by e-mail or typed correspondence, right?

A. Yeah, totally inappropriate, but, yes, we do.

Q. The interesting thing that I was going to point out is that, for instance, on the day you gave Mr. Moore the test, you spent six hours with him, correct?

A. I did, yes.

Q. Okay. And you had to obviously get to the jail and go through the check-in.

A. I did.

Q. And then you had, once you were done, you had to gather up all your stuff, go catch a ride or get a cab back to wherever you were going?

A. Correct.

Q. I guess my point is that in normal life outside of prison, we don't have a lot of time these days, do we?

A. No, I—a lot of us don't.

Q. Okay.

MR. PEEBLES: I'll object to relevance at this point.

MR. MCCANN: And I'll tie it up, Your Honor.

THE COURT: I'm not really sure where you're going, Counsel.

Q. (BY MR. MCCANN) But—so you don't have the time [178] to write a letter but someone sitting in prison has the time to not only write a letter but to write it over and over and over again and practice it until, like a proud child, it looks perfect or as perfect as they're going to make it; is that fair?

A. Absolutely they have the time to do that.

Q. Okay. And if Mr. Moore's—assuming that he wrote his own letters and you saw that Mr. Moore's process for writing such letters involved 10 or 12 drafts of something, would that perhaps alter your thinking on whether or not he was writing at a true seventh grade level?

A. Of course that would depend. It would if every single time he wrote, he had to do 10 to 12 drafts. And there's a lot of writing in his possessions right now. If every single time, I'd say, yes. Now, is there sometimes that it may have been repetitious for him to learn or he wanted to write it to make sure it really was perfect before sending it out to somebody important, that would be different. So that's—I'm sorry. That's a very equivocal answer that I gave you but that's the best I can do.

Q. That's fair. That's fair. Is it possible it could change your perception of the pie?

A. Sure.

Q. Okay. Looking at this, it sounds to me that you have some skepticism based on what you believe to be [179] adaptive deficits and adaptive skills but if some of those assumptions that you made looking at these matters were changed, then that would change your opinion, wouldn't it?

A. It may.

Q. Okay. Thank you.

* * *

Q. (BY MR. PEEBLES) Dr. Compton, when you were talking about your testing for malingering, I think that you mentioned there were some very simple math problems that Mr. Moore could not get correct or did not get correct on the test; is that accurate?

A. That's correct.

Q. Then there were some other math problems with three digits, four digits that he did just fine on; is that accurate?

A. That's accurate.

Q. Those real simple ones that he missed, can you relate that to those weeks and weeks and weeks' worth of commissary reports? You know what I mean?

A. I can say this. It's not consistent. When you miss something like 6 plus 2 or 6 plus 3 but then you can add something that has four digits or three digits, which [180] was on my testing—I'm not talking about just commissary—it's just not consistent with the ability that was demonstrated later in the testing nor is it consistent with the ability to add.

Q. So, would you agree then that it perhaps increases the chance that somebody is not exerting full effort on that test?

A. Yes. And like I said, I looked at multiple pieces on that. It wasn't just one thing or two things. It was several things that I looked at.

MR. PEEBLES: May I just approach briefly, Judge?

THE COURT: Sure.

(Brief pause.)

MR. PEEBLES: I'll find it. One minute.

THE COURT: Take your time.

MR. PEEBLES: Okay. I apologize.

Q. (BY MR. PEEBLES) Mr. McCann had asked you some questions about if something was underlined it could mean that the person that underlined it was—didn't understand it and that's why they were underlining. Do you remember that?

A. Yes, I do.

Q. Is this fair to say, that for that to be true, someone would have to first understand the surrounding [181] context of that underlined portion?

A. Context within the writing?

Q. Yes.

A. Generally that would be true, yes.

Q. And then they would have to recognize obviously that that portion they didn't understand given that context?

A. Correct.

Q. And then most of the time it would indicate that they have a desire to then go find out what it means?

A. Correct.

Q. You were also given the possibility that Mr. Moore received books from an outside source that were already underlined. You remember that?

A. Yes.

Q. Specifically I think the example was perhaps the Bible.

A. Yes.

Q. That was already underlined. Is it your impression, either as layperson or as an expert, when you step back and look at all this evidence, that that's what was happening? That Mr. Moore was receiving these and they were already underlined?

A. I think that would be unlikely.

Q. I'll get it if I need it.

Do you remember an incident where—for [182] purposes of the record, in State's Exhibit 27, pages 117 and 122, Mr. Moore was taken to be evaluated psychologically and when he arrived, he said, no, I've been mis—the guards misunderstand my periods of silence and meditation due to my Islamic practices. They're misunderstanding that for mental illness. It's not mental illness. It's my periods of meditation and silence. Do you recall that?

A. I do.

Q. Okay. So, might that be consistent with Mr. Moore going through the Qur'an or some of these other books and underlining those things for himself?

A. Certainly if he has periods of meditation and religious meditation, that would be consistent.

Q. You were also asked a couple questions about woodshedding. You ever heard that word?

A. Yes.

Q. Okay. Specifically that, well, any good defense lawyer would have woodshedded or prepared Mr. Moore not just for the direct examination but also for potential cross-examination by a prosecutor, right?

A. Yes.

Q. And that may well be true. However, you reviewed State's Exhibit 13, which was a transcript of a hearing when Mr. Moore was brought back to address some *pro se* motions that he had filed; specifically, whether he was going to [183] represent himself or get a new lawyer for purposes of his appeal. Do you remember that?

A. I do.

Q. Is there any reason to think that even if, hypothetically, woodshedding existed at the trial, it would have existed prior to a *pro se* hearing like this?

A. Well, you're saying would somebody have been around to coach him on what to say, what to do and how to behave?

Q. Exactly.

A. Well, he wouldn't have a lawyer because he's *pro se*, so, no.

* * *

[184] Q. (BY MR. MCCANN) Doctor, I think you are far too young to remember this but do you remember getting things you had to copy down in school?

A. Sure.

Q. Okay. Do you remember that they were often very—they were poems or passages that you would copy, like Lincoln's Gettysburg Address, that type of thing?

A. Oh, yes. And there's some indications in his writings of things that are very likely copied, poems or passages.

Q. Okay. And that's State's Exhibit 32 in his book?

A. Yes, I mean—yes, there are indications in there of that.

Q. Okay. So, if someone is copying something, other than what you had talked about before—

A. Uh-huh.

Q. —knowing what the letters stand for, it is something still within the ability of someone who has intellectual disability?

A. If they're just copying the samples, yes.

Q. Okay. Fair enough. And I did want to mention to [185] you when you worked at the prison, was it common, in Kansas, to have visits from religious folk, like priests or reverends, who would go and minister to the inmates?

A. Oh, of course. I mean, there is a chaplain on-site and priests and other religious and faith-based organizations coming on a regular basis.

Q. And in most prisons, and I'm assuming Kansas was similar, there are people of varying degrees of literacy, not just Mr. Moore but others who perhaps did not ever receive an education at all, regardless of whether they were intellectually disabled.

A. That's absolutely correct.

Q. Did you ever accompany them on some of these visits? The clergy?

A. No, I did not.

Q. Would it surprise you if you were to learn that oftentimes clergy will mark a passage in the Bible to assist inmates in their daily devotions or meditations?

A. Oh, no, not at all. I think they're directing their attention to something they want them to focus on.

Q. For instance, an inmate who has bad behavior might be given a Psalm about inner peace?

A. You bet.

Q. Okay. And I think no one is questioning that you approached this with an open mind, but I just want to be [186] clear. You at one point had given a report to Mr. Peebles and I will bring it up to you—

MR. MCCANN: If I may approach?

THE COURT: Sure.

Q. (BY MR. MCCANN) And is this the report that you had given?

A. Yes.

Q. Okay. And in this portion here, let's see if I've got this correct. Limitations.

A. Uh-huh.

Q. Could you read that paragraph?

A. Absolutely. I cannot definitively diagnose Mr. Moore as having or not having mental retardation as the only way to diagnose an individual is to conduct an extensive individual evaluation. However, I can provide a critique of the evidence offered to confirm or disconfirm that Mr. Moore is mentally retarded.

Q. Okay. And certainly you've given some critique of some of the tests and the other methods that were used here but if your assumptions on his adaptive skills were incorrect, then your skepticism of this determination of mental retardation would have to be reevaluated, wouldn't it?

A. If my assumptions about his adaptive deficits or adaptive functioning was incorrect, yes, I would revise my [187] opinion.

Q. And in regard to the *pro se* appearance, certainly he would not have had a Court-appointed lawyer but as you heard from Mr. Fronckiewicz, there was a fellow named David Harris who was actually advising and consulting with Mr. Moore back in those days, wasn't there?

A. My understanding is that there was a couple people that would talk to inmates. I really—I don't know how much that went on and I don't think anybody knows because Mr. Harris is now deceased.

Q. Yes, he is.

A. And Mr. Fronck—

Q. Fronckiewicz

A. Fronckiewicz. He did not actually have first-hand knowledge of that, either.

Q. That's fair.

A. So, I don't know.

Q. That's fair. Doctor, thank you for your time.

* * *

Q. (BY MR. PEEBLES) Mr. McCann had you look at and [188] had you read something you wrote from a preliminary report, correct?

A. Correct.

Q. Did you write that report before or after you went and gave the specific testing to Mr. Moore?

A. That was before.

Q. And the whole point of that was for you to say I can't definitively diagnose him one way or the other because in order to do that, I would have to go give specific tests?

A. Yes. It's unethical for a psychologist to diagnosis anyone without evaluating them personally.

Q. And your opinion today then is based on everything, including that testing, right?

A. Yes, that's correct.

* * *

Exhibit: Compton Curriculum Vitae

Vita

Kristi L. Compton, Ph.D.
Clinical and Forensic Psychology
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Education:

- Wichita State University, Wichita, KS. M.A. in Clinical Psychology (Conferred May, 1997)
- Wichita State University, Wichita, KS. Ph.D. in Clinical Psychology (Conferred on 7-15-2000)

Licenses:

- Texas Licensed Psychologist #32380
- Past Kansas Licensure (currently on inactive status)

Professional Experience:

Indian Alcohol Treatment Services
Wichita, KS (May 1997-May 1999)

- Substance abuse-treatment and court-ordered substance abuse evaluations

Comprehensive Community Care of Sedgwick County
Wichita, KS (May 1997-May 1999)

- Crisis Intervention Specialist (mobile crisis unit responding to law enforcement calls for assistance in acute psychiatric emergencies).

Ulster County Mental Health Department APA-Approved Predoctoral Internship
Kingston, New York (June 1999-June 2000)

- General Clinical and Forensic Psychology
- Court-ordered Substance Abuse Evaluations
- Parental Fitness, (with training on conducting child custody evaluations)
- Competency to Stand Trial Evaluations (supervised training)

South Central Mental Health Counseling Center
El Dorado, KS (July 2000-Sept 2004)

- General Clinical Psychology (ages 8 through adult)
- Court-ordered Substance Abuse/Dependency Evaluations
- Child Custody/Parental Fitness Evaluations, Court-ordered Family Mediation
- Competency to Stand Trial Evaluations
- Involuntary Commitment Evaluations
- Disability Determination Evaluations
- Mental State at the Time of Offense Evaluations

El Dorado Correctional Facility (Maximum Security Unit)
El Dorado, KS (July 2001-June 2003)

- Civil Commitment Sex Offender Evaluations
- Classification
- Post-Adjudicative Psychological Evaluations of Murderers and Sex Offenders

- Clinical Supervisor of Master Level Clinicians

Private Practice
Psychology Consultants
Wichita, Kansas (Jan. 2001-Sept. 2004)

- General Clinical Psychology
- Forensic Psychology

Private Practice
Dallas, Texas (Nov. 2004 to present)

- Forensic Psychology

  Specializing in mental state at time of offense evaluations, competency to stand trial, diminished capacity, sex offender risk assessment, and allegations of false sexual abuse, and mental retardation evaluations.

- Clinical Psychology

  Adult/Adolescent Psychotherapy with specialties in treatment of depression, anxiety, and schizophrenia.

- Disability Examinations

Research Positions:

Comprehensive Community Care of Sedgwick County
Wichita, Kansas (Sept. 1996-Aug. 1997)

- Development of a research protocol to assess the needs of adults with persistent mental illness and children with severe emotional disorders.
- Statistical analysis and recommendations to the County on how to improve community based services.

National Commission Against Drunk Driving
Washington, D. C (Aug. 1997-Aug. 1998)

- Literature review on the incidence, prevalence, and efficacy of interventions associated with drunk driving.
- Rewriting research in lay language for placement on a website designed for law enforcement personnel and those working in the prevention field.
- Development of a research protocol assessing the usefulness of the website with subsequent recommendations for improvement.

Teaching Experience

Wichita State University
Wichita, Ks (June, 1997-May 1999)

- Alcohol Use and Abuse, #336
- Psychology of Women, #543
- Cognitive-Behavioral Therapy Practicum , #834
- Social Psychology, #312
- Psychological Problems in Society, #416

University of Texas at Dallas (current)
Richardson, Texas

- Forensic Psychology, # 428

Publications:

Shore, E.R., & Compton, K.L. (1998). Wadda mean I can't drink and drive: Threat to competence as a factor in drunk driving interventions. Journal of Prevention and Intervention in the Community, 17(1), 45-53.

Shore, E.R., & Compton, K.L. (2000). Individual attempts to prevent drunk driving: Types, efficacy, and a theoretical perspective. Journal of Drug Education, 30(3), 281-289.

Compton, K.L., Snyder, J.D., Schrepherman, L.A., et al. (2003). The contributions of parents and siblings antisocial and depressive behavior in adolescents: A double jeopardy coercion model. Development and Psychopathology, 15, 163-182.

Professional Affiliations:

American Psychological Association- Member
Texas Psychological Association-Member

Community Service

Dallas Challenge-Board Member

IN THE TEXAS COURT OF CRIMINAL APPEALS

Case No. 314483-A

EX PARTE

v.

BOBBY JAMES MOORE,

Applicant.

CAUSE NO. 74,059 AND
IN THE 185TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Affidavit

Declaration of Gina T. Vitale, LMSW, CCFC

I, Gina T. Vitale, LMSW, CCFC hereby state as follows:

1. I have been appointed by the court as a mitigation expert for the defense in State of Texas V. Bobby Moore. I am a master level social worker duly licensed to practice in the state of Texas since 1997. I am also licensed by the American Academy of Forensic Counselors as a Certified Clinical Forensic Counselor. I am a member of the National Association of Social Workers, the National Association of Sentencing Advocates and the National Association of Forensic Social Workers.

2. I currently provide mitigation investigations throughout East Texas, where I have been an

independent contractor since 1999. I have attended and served as a faculty member in numerous CLE-approved training seminars sponsored by the Texas Defender Service, Texas Criminal Defense Lawyers Association and the Texas state bar association. From 1989 to 1993, I supervised behavior management programs and assisted with psychological testing for children with mental health and mental retardation diagnoses at the New Orleans Children and Adolescent Psychiatric Hospital. I was employed by Depelchin Children's Center from 1994 until 1997 where I worked with victims of abuse and neglect as well as children and families involved in the juvenile justice and protective services systems. Additionally, I have provided crisis intervention and counseling to victims of violent crime, domestic abuse and traumatic injury at Memorial Hermann Hospital since 1997 where I am also responsible for conducting assessments and determining appropriate placement for patients seeking emergency treatment for mental illness.

3. I have been asked by the attorneys for Bobby Moore to review all available information and conduct an independent investigation in order to form an opinion regarding Mr. Moore's mental capabilities. In my investigation, I have followed the standard of care required by mental health and medical professionals who may rely upon the investigation to reach their expert opinions. As part of my responsibilities, I have completed the following tasks.

   a) Conducted interviews with Mr. Moore's family to develop an outline of his social history,

including medical history, educational and employment history and history of childhood trauma.

b) Reviewed transcripts of 1983 trial, 1993 Writ Hearing and Punishment Hearing.

c) Reviewed Mr. Moore's HISD permanent file and available school records from siblings

d) Reviewed Moore family medical records from family physician

e) Reviewed affidavits and interview notes compiled by Mr. Moore's previous defense team.

f) Reviewed reports of psychological evaluations by HISD and TDCJ.

g) Reviewed Mr. Moore's complete file from previous and current TDCJ incarcerations.

h) Attempted to locate and interview Mr. Moore's childhood teachers, employers, and family friends. Unfortunately, most of these individuals are now deceased due to the amount of time that has passed.

4. My investigation has uncovered a significant amount of compelling evidence to indicate that Mr. Moore meets the diagnostic criteria set forth by the Diagnostic and Statistical Manual (DSM-IV) as well as the American Association on Mental Retardation (AAMR) which state that in addition to subaverage intellectual functioning an individual must exhibit deficits in adaptive behavior beginning during the developmental period.

Intelligence Quotient

As a child and young adult, Bobby Moore's limited educational achievement and immature social skills were such that educators and therapists in numerous settings identified him as potentially suffering from mental retardation. As a result of recommendations by these professionals, Bobby's IQ was tested on several different occasions.

Bobby's first formal testing is done at Atherton Elementary School in 1966. Bobby is given the Metropolitan Readiness Test (MRT) and Draw-A-Man Test. Although specific IQ scores are not documented, results of the MRT place Bobby in the 9th percentile nationally and performance on the Draw-A-Man test is described as "immature." In November of 1971, while in the fifth grade at Scroggins Elementary Bobby is given the Otis-Lennon Mental Abilities Test, a district wide, group administered, IQ screening tool mandated by the state. Bobby receives a score of 77 The following year, at Alcott Elementary School, Bobby was administered the Slosson Intelligence Test and receives a score of 57, placing him well under the cutoff for mental retardation (HISD Elementary Test Record). This score prompts a referral to the district's appraisal specialist and in January of 1973 Bobby is administered a battery of tests by district psychologists. Results on the Wechsler Intelligence Scale for Children-Revised showed Bobby's full-scale IQ score to be 78. However, other tests results indicate a much lower IQ. Bobby's score on the Bender Gestalt Test indicates a mental age of eight years- eleven months (HISD Psychological Evaluation, 1/24/73). As Richard Borda testified at Bobby's 1993 Writ Hearing, IQ can be calculated by dividing mental age by chronological age. With a chronological age of thirteen

years and three months at the time of testing, Bender results indicate an IQ score of 67. Similarly, on the Goodenough Draw-A-Man test, Bobby's score has a mental age equivalent of nine years and eleven months, indicating an IQ of 71 when compared with his chronological age (HISD Psychological Evaluation, 1/24/73). Unfortunately, despite Bobby's low scores and what Richard Borda testifies is documentation "throughout his records. . . again and again. . . that he probably should be in a special education program" (trial transcript from 1993 Writ Hearing, page87) Bobby receives no special services and continues to be promoted based solely on his age (HISD Permanent Record).

Bobby ultimately drops out of school and his mental abilities are not questioned again until several years after he enters the Texas Department of Corrections. In 1989 a staff member conducting a routine quality assurance audit notes, Scores on an "abbreviated WAIS-R. . . yielded an estimated IQ of 71. . . This patient does not need services for mental illness but may need services for mentally retarded. Recommendation: efforts should be made to obtain records of psychological/educational assessment reports from public schools to determine his level of intellectual functioning during the developmental period. In addition he should be tested in order to determine his current level of intellectual functioning and assess his needs for mental retardation services" (1/26/89 TDCJ Clinic notes). As Robert Borda points out in his 1993 testimony, the error range for IQ testing is 5 points. Therefore, bobby's highest IQ score may have been as low as 73 and his lowest 52.

Adaptive Functioning

The AAMR states that in addition to significant limitations in intellectual functioning, an individual must show deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills arenas. While Bobby shows some deficits in all areas of adaptive functioning, his most significant limitations appear to be in communication and functional academics.

Communication refers to an individual's ability to comprehend and express information, spoken, written, and non-verbally. This category also addresses the ability to understand a request, comment or command and react appropriately. It is well documented by family report and school personnel that Bobby's communication skills are severely limited. In addition to a severe speech impediment that sister, Clara Jean Baker, recalls brothers Johnnie B. and Ronnie Moore report, "he had trouble comprehending what was going on" (5/28/00 interview with Johnnie B. and Ronnie Moore). Marcelle Tucker, Educational Consultant for HISD, notes that Bobby is "extremely quiet" and "takes no part in class activity unless called on" (HISD Psychological Evaluation, 1/24/73). Bobby himself recalls these difficulties as a child, explaining, ". . . It seemed like people disliked me. . . I was just shy and didn't know how to communicate." Bobby recalls one of his few friends from childhood, an older boy who is deaf and dumb; "We had a natural communication. . . at first it was hard to understand him, but he used his body to show me what he wanted and the more time we spent, the more I learned to communicate" (5/29/00 interview with Bobby Moore). In addition to these expressive language problems, Bobby's difficulties in receptive language skills are noted in his 1968 school

records. Regarding Bobby's reaction to commands/ requests he is below average in his ability to respond "promptly and willingly" to directions.

Bobby's deficits in communication extend beyond his verbal limitations. In an interview with attorneys, Bobby discussed the evolution of his literacy, "Before I was on death row I could only read small words like 'and', 'cat', 'dog'. I couldn't understand bigger words. I didn't know how to write other than my name" (8/10/00 Interview with Bobby Moore).

> "Bobby writes of his distress when he received his first letter from a family member. . . and could not read it. Bobby asked his next-door neighbor to read it to him and reply on his behalf. Bobby copied the letter out. . . and studied it until he was able to remember some of the words." (From Rowena Orr's notes on 10/18/00 interview with Bobby Moore)

Bobby states that it was this experience, which taught him the importance of written communication. Bobby spent the next several years improving his writing skills. However, it takes several days to compose a letter, "working for hours at a time with his dictionary in hand" (From Jemma Levinson's notes on 5/2/00 meeting with Bobby Moore)

Social skills, which refer to an individual's ability to interact appropriately with others is closely related and often intertwined with communication skills. Social skills include making friends, conducting transactions in public, sharing, cooperation, following rules and showing empathy and compassion towards others. Bobby's social skills are difficult to assess due to his limited interaction with peers and chaotic family

environment. Rampant physical abuse, extreme poverty and domestic violence prevented siblings from interacting with each other and peers in what would be considered a normal childhood fashion. Similarly, it is difficult to assess Bobby's strengths and/or weaknesses in the area of leisure activity. It is clear that Bobby makes poor decisions about peer groups and participating in illegal activities. However, it may be that these behaviors were not the result of bad decisions, but decisions necessary for survival.

Functional academics, Bobby's weakest area, refers to academic skills learned in schools that are necessary for daily living including math, reading, spelling and knowledge of basic geography and health issues. Bobby's siblings clearly recall the difficulties Bobby had in school.

> "As a child Bobby was a slow learner. . . he stuttered badly and had trouble reading writing and comprehending what was going on. . . he realized almost immediately that he was different from the other kids in school because of his slowness. . . He really started feeling dumb because he could not answer any questions in class, and he could not read or write. When other kids saw his weakness they teased him. . . . when he left school he was barely able to read" (From Jemma Levinson memo on 5/28/00 interview with Johnnie B. and Ronnie Moore)

Teachers aware of Bobby's weaknesses made allowances for him in class. Bobby remembers in Elementary school that he was "kept separate from the rest of the class, as he did not fell able to participate. . . . He spent most of the time drawing pictures and listening to special tapes." Bobby recalls

"Mss. Hatfield and Ms. McIntosh were willing to help and he had a different section at the back of the class where he would be given homework cards. . . In lessons Bobby sat right next to Ms. Wagoner's desk. . . Ms. Wagoner would check to see how he was doing. . . she would separate him from the class and go over reading, spelling and math." Bobby "didn't feel comfortable or like he belonged. . . he felt different than the rest. . . it was hard to participate because he couldn't comprehend. . . he would generally be in the corner looking at cards with words on them. . . people would laugh. . . the teacher thought it would be better to distance him."(From Jemma Levinson's notes on 5/29/00 interview with Bobby Moore)

Problems worsened, as Bobby got older. He remembers, "School began to get harder as they began to have tests. It was at this time that he realized that he hadn't learned the things that he was supposed to have learned like reading and writing." In junior high "that was when it really began to show what you knew and what you didn't. . . he felt more outcast because there was so much that he couldn't participate in, such as reading and spelling. In class he would hope that the teacher wouldn't ask him to go to the board" (From Jemma Levinson's notes on 5/29/00 interview with Bobby Moore). Family points out that Bobby's poor school performance was not for lack of trying. Sister, Clara Jean Baker remembers, "seeing low report cards. . . it upset him because he tried. . . Marion would make them sit on the porch and do their homework, Bobby would get frustrated" (From Jemma Levinson's notes on 5/27/00 meeting with Clara Jean Baker). Bobby remembers, "He wanted to learn and would get frustrated. When other children laughed at him it was embarrassing. A few would call him dumb and make him feel different . . . Bobby said homework was OK

because it felt good to learn without people laughing" (From Jemma Levinson's notes on 5/29/00 meeting with Bobby Moore).

School records Chronicle Bobby's inability to succeed in a traditional academic environment. Bobby's results on the 1971 Iowa test of Basic skills indicate that Bobby is functioning below average in every area. The following year, Bobby's scores place him in the fifth percentile nationally (HISD Permanent Record). In 1972 Alcott staff documents that Bobby "needs special placement" due to "reading weakness" but it is not evident that this is ever implemented (HISD Permanent Record). In 1973 Bobby's scores on standardized tests again place him in the 5th percentile nationally and at the time of his 1973 HISD psychological evaluation it is noted that he "does not seem to understand that subtraction is the reverse of addition" (HISD Psychological Evaluation, 1/24/73). In the 1975-76 school year Bobby fails all of his classes but continues to be promoted due to age (HISD Permanent Record). By the time Bobby reaches the eighth grade he is failing all of his classes but one and after failing all classes in the 9th grade, no longer allowed in the family home by his father, Bobby decides to leave school.

Another area of adaptive behavior where we see deficits in bobby's functioning is the category of self-direction. Self-direction addresses whether an individual is able to think and act on his own. Requesting assistance when needed. Problem solving and assertiveness are addressed in this category. Bobby's immediate and extended family agrees that Bobby allowed those around him to make decisions for him. Bobby is described as "impressionable" (From Jemma Levinson's notes on 5/27/00 interview with Larry

Baker); "as far as planning on doing things . . . he was definitely a follower."(From this writer's notes on 6/5/03 interview with Lonnie Moore). Clara Jean Baker recalls, "Bobby wasn't the one to decide things . . . he just went along with the program." Clara also points out that in comparing Bobby to his cousin Keith Snelgro who was only one day older than Bobby that "Keith was always more advanced than Bobby was. . . Keith was a more initiative type of person . . . more a go getter than Bobby." (From this writer's 6/4/03 notes on interview with Clara Jean Baker). School records also indicate deficits in the area of self-direction. 1968 & 1969 conduct records show a below average ability to discipline himself.

Despite teasing at school and frequent bullying, family cannot recall a time that Bobby ever came to them for assistance. Cousin, Parneva Richardson recalls, "everyone knew if you messed with Bobby you would have to deal with his brothers, that's just how it worked, but not because Bobby asked for the help." (From this writer's 6/7/03 interview with Parneva Richardson). In fact, Clara Jean Baker, Marion Moore and Aunt Cloteal Morris agree that, if anything Bobby kept problems from them. Bobby's recollection of his actions also reflects his inability to ask for help in appropriate ways. When kicked out of his parents home, with no where to go, Bobby admits that he sleeps on a car windshield, sneaks into a garage or sleeps in an abandoned building rather than going to friends to ask for help (2/9/00 interview with Bobby Moore).

Bobby's strengths and/or weaknesses in the areas of self-care and home living are difficult to assess due to the family's financial status. Parneva Richardson points out that Bobby's clothes were always worn and

disheveled, but attributes this to the family's poverty and the need for Bobby to share clothes with his nine siblings (6/7/03 interview with Parneva Richardson). It is also noted by several family members that Bobby was known to rummage through neighborhood dumpsters in order to find food. However, Bobby and his family describe this as their only option; the health risks involved were simply not considered. This behavior also goes to Bobby's functioning with regards to health and safety activities- one's ability to care for one's self through basic safety, first aid, and proper diet. Bobby's decision to obtain food out of trash receptacles despite previously becoming ill and his decision to remove his own leg cast after a lawn mowing injury indicate deficits in this area.

Bobby's strengths/weaknesses in the category of household maintenance are unclear. Bobby never lives on his own and is never solely responsible for budgeting, housekeeping, shopping or maintaining general home safety. Up until the commission of this crime, at age 23, Bobby is living in the home of a woman he refers to as his "play mamma". Family points out that in his youth when Bobby would get money from odd jobs around the neighborhood his mother would have to tell him what to buy (6/4/03 interview with Lonnie Moore).

The use of community resources such as banks, parks, public transportation and churches and an individual's ability to behave/interact appropriately when utilizing these services is another indicator of adaptive functioning. The information available makes it difficult to evaluate Bobby's capabilities in this category. We do know that he enjoyed spending time at a neighborhood swimming pool and that he attended church with his Aunt Cloteal when his

mother would allow him. Bobby's behavior in church is described only as "quiet and withdrawn" (6/5/03 interview with Cloteal Morris). There is no evidence of inappropriate behavior at any of these facilities. However, Bobby's reluctance to interact with those around him may be the result of a knowledge deficit regarding appropriate behavior.

The final category of adaptive behavior addressed by the AAMR is that of employment; an individual's ability to hold a job, follow job rules and regulations and be a productive employee. It is clear from interviewing Bobby and his family that he was employed in non-traditional settings. He was paid in cash and was not required to complete a job application. Bobby obtained employment most frequently by approaching neighbors to ask if they had chores he could do for extra cash. Bobby's jobs included bagging ice, mowing lawns and working as a busboy. Bobby remembers fondly working for Mr. Roberts at the local pharmacy doing whatever odd jobs were available. Bobby recalls "at times I wanted to get jobs but I was too embarrassed because I couldn't read or write . . . Bobby went for a job in a hospital, he got a man outside to fill out the form but then got too scared to go in" (From Jemma Levinson's notes on 5/25/00 interview with Bobby Moore).

Causality

Having looked at evidence to support a mental retardation claim, we must now look at possible causes. According to The ARC (formerly the Association for Retarded Citizens), mental retardation is attributable to any condition that impairs development of the brain before birth, during birth or in the developmental period (The Arc, 1993). However, in as many as 75% of the children diagnosed with mental

retardation, causality cannot be determined and research shows that as many as 50% of individuals with mental retardation have been found to possess more than one causal factor. In the case of Bobby Moore, numerous childhood incidents and circumstances are found that can potentially cause mental retardation.

The most commonly recognized causes of mental retardation are *genetic conditions, Problems during pregnancy, Problems at birth, Health problems, Environmental factors and Educational factors*

Mental retardation can be cause by genetic conditions such as Down syndrome, fragile X syndrome, and Phenylketonuria. Mental retardation may also be caused by errors occurring when genes combine or by abnormal genes inherited from parents. In Bobby Moore's case we have no formal indication of the IQ of Bobby's siblings or family members. However, family history and interviews indicate that several of Bobby's immediate and extended family may also suffer from some form of mental retardation or other mental illness. Bobby and his siblings describe their sister Janice as having educational difficulties similar to Bobby's. Interviewer notes from a February 5th, 2000 interview with Bobby's extended family indicate that Bobby's paternal aunt, Hazel Bradford was "as Larry put it, she 'wasn't quite right in the head' and seemed almost retarded" (From Patrick Moran's notes on 2/5/00 interview with the Moore Family). Also, Bobby's mother suffers from such severe deficits in her adaptive functioning that Clara Jean and Larry Baker agree that "Marion likely has some degree of mental retardation" (From Jemma Levinsons's notes on 3/16/00 interview with Larry and Clara Jean Baker). As a result of Ms. Moore's inability to complete

household activities, daughters Clara Jean and Colleen Moore were responsible for paying bills, cooking, cleaning and caring for younger siblings. When limited finances caused the family to lose their home it was the older children who worked to raise the money for rent and ultimately went out in search of a new home for the family.

Mental retardation can result when the baby does not develop inside the mother properly or if problems occur during labor and childbirth. Untreated diseases such as high blood pressure and diabetes in the mother and physical trauma are potential causes of mental retardation. *Unfortunately, very little is known about Marion's pregnancy with Bobby or his delivery. Marion* denies problems with pregnancy but admits to not receiving prenatal care. Mother reports that her two oldest were born at home and that "when she went into labor with Clara Jean she went to the bathroom because she didn't realize. . . After Clara Jean, Marion. . . was able to keep track of the months because she knew what was happening" (From Jemma Levinson's 5/27/00 notes on interview with Marion Moore). Due to Marion Moore's limited knowledge of appropriate self-care during pregnancy and the violence she experienced at the hands of her husband we cannot rule out the possibility of mental retardation caused by prenatal trauma and/or untreated maternal illness.

Mental retardation can also be caused by extreme malnutrition, lack of appropriate medical care, or by brain trauma. Diseases such as Whooping Cough, Meningitis and extreme fever that goes untreated can also cause mental retardation. The lack of food in the Moore home is well documented. Ronnie Moore remembers, "We spent a lot of time with no adult supervision. . . there were many nights when we did

not get to eat dinner because there was not enough money to buy food." (429/92 Affidavit). Colleen states, "We always seemed not to have enough to eat" and handwritten interview notes in the attorney file state that family "didn't eat because mother didn't have money for food." In a recent interview with this writer, maternal second cousin,

Cloteal Morris stated "I remember when the kids were very small. . . . they didn't even have an icebox . . I just thought that was terrible and I was busy with my life. . . trying to work and go to school but I'd see them as very young children running around in their diapers. . . nobody paying attention. . . one time they had no electric and they had a bucket of fire in the middle of the room to keep warm. . . I used to drop off sandwich meat and bread and stuff because I figured that was the kind of thing the kids could fix themselves" (5/23/03 interview with Cloteal Morris).

Siblings recall that the lack of food in the home often meant that they would look for food in neighborhood dumpsters. Marion Moore and several of Bobby's siblings recall Bobby getting Ptomaine poisoning after eating from trashcans and requiring hospitalization on at least two occasions. Family recollections are supported by school records, which indicate that Bobby's nutritional status is "poor" (HISD Medical Exam).

Also, Marion Moore admits to a fear of hospitals, which often prevented her from getting adequate medical care for her children. Bobby's 1975 Hartman Jr. High Health record indicates that no immunizations were received for the previous ten years. Also, family recalls Jessie Moore suffering from an umbilical hernia at birth. Marion did not take him to have the hernia repaired until Jessie was sixteen years old

and it was interfering with his daily life (5/27/00 interview with Marion Moore).

There is also an indication that Bobby may have received numerous head injuries which Robert Borda testifies, "can certainly affect" IQ (Testimony of Robert Borda, PhD, at 1993 Writ Hearing, page. 97). Brothers recall the degree of family violence, stating that Bobby would get "beaten up by his older brothers. . . his father would also hit him with things, sometimes in the head. . . he was left bruised and injured from many of these beatings." (From Jemma Lævinson's notes on 5/28/00 interview with Johnnie B. and Ronnie Moore). Bobby also suffered a significant head injury while attending Scroggins Elementary School. During a race riot, Bobby was hit in the head and face with a brick and a chain. Family disagrees on whether Bobby received immediate medical attention and cousin; Parneva Richardson recalls that he was more withdrawn after that event (6/4/03 interview with Parneva Richardson). Jean also reports that Bobby fell off a train that same year, hitting his head. Again, he received no medical attention. (4/13/93 letter from Cotton Bledsoe to Robert Borda)

Environmental factors, such as socioeconomic status, access to health care and exposure to pollutants are common causes of mild forms of mental retardation. Community resources indicate a number of opportunities for exposure to toxins in the life of Mr. Moore and his siblings. During his childhood, the Moore family lived in the area of Houston known as the fifth ward. In the last five years the city has found nearly 90 homes with lead contaminated soil resulting from operation of the MDI Steel Casing Company in the area from 1926 until 1992. It is not known if any of the Moores' homes were found to have lead

contamination. Bobby also had the potential for exposure to environmental hazards while attending Scroggins Elementary School. Bobby's attendance at the school was prior to the removal of asbestos from the building (Houston Chronicle article 8/2/85 by Dianna Hunt: violations charged in Asbestos removal). Additionally, Scroggins Elementary is on the same street as Ware Electro Plating, and 83 year old company that city officials sate is "one of the worst sights. . . for environmental violations. . . they have a total disregard for public health." Most recently the company has been sited with allowing cyanide to run off into neighborhood drainage ditches. We do not know what violations may have occurred during the time that Bobby attended Scroggins and walked from his home to the school daily (Houston Chronicle article on 1/27/99 by John Making: Authorities say plating company letting cyanide foul ditch/ Firm located near a ship channel-area residential neighborhood).

Finally, the absence of adults willing or able to foster mental acuity and encourage appropriate adaptive behaviors can also cause mild forms of mental retardation. There is no question that Marion and Ernest Moore's participation in Bobby's academic life was minimal. Bobby remember that his father was often out drinking and that his mother "would work from 6am to 7pm daily and when she came home she would see very little of the kids" (From Jemma Levinson's notes on 2/19/00 interview with Bobby Moore). Marion Moore admits that she "never helped him and never forced him to do his homework mostly because she was at work and when she got home she was tired" (From Jemma Levinson's notes on 5/29/00 interview with Marion Moore). Clara Jean does not place the blame on her mother who she recalls was a hard worker but states, "my father never gave Bobby

the supervision, support or nurturing that a good father should give his son" (3/31/92 affidavit of Clara Jean Baker). Perhaps the most telling evidence of Bobby's lack of parental support is the signature of Clara Jean Baker, Bobby's older sister, as his parent or guardian.

Based on the above, it is my opinion that there is a wealth of information from a variety of sources to support Mr. Moore's claim of mental retardation. It is my opinion that Mr. Moore should be granted a hearing before the court to address this issue.

This declaration is respectfully submitted on the 16th day of June 2003.

/s/ Gina T. Vitale
Gina T. Vitale, LMSW, CCFC

SWORN TO AND SUBSCRIBED before me on the 16th day of June, 2003.

/s/ Diana Sobotik
Notary Public

[Seal]

AFFIDAVIT OF DR. RICHARD GARNETT

REVIEW OF CASE FOR BOBBY JAMES MOORE

My name is Dr. Richard Garnett. I am over the age of eighteen. I have first-hand knowledge of the facts and opinions asserted in this affidavit.

I hold Bachelors, Masters and Doctorate degrees in Psychology, and have taught at the graduate level at the University of Miami, South Florida School of Professional Psychology, Florida International University, and Texas Christian University. I have thirty-five years of professional experience working with people with mental retardation. I have served as a psychologist and diagnostician, a counselor and therapist, a juvenile probation officer, and as a consultant and trainer in the field. During my thirty-five years of experience, I have served on committees and Boards of Directors for local, state, and national organizations that serve or represent people with mental retardation. I have developed curriculum and taught courses throughout the country for graduate college programs, criminal justice, law enforcement, and child protective services caseworkers, all with at least some focus on people with mental retardation. In my clinical practice over the last thirty years, I have seen hundreds of people with mental retardation for a wide variety of reasons, including stress, abuse and assessment. I have enjoyed being an advisor, friend, and counselor for members of Advocates United of Tarrant County and currently serve on the Board of Directors for the Texas Self Advocates, both active organizations whose memberships are made up of people with mental retardation. I am past-President of the Texas Association on Mental Retardation, President of The Arc of Texas, Chairman of the Fund Development Board of The Arc of Texas, a member of the regional

Medicaid Managed Care Advisory Council for HHSC, and a member of the Mental Retardation Public Advisory Council for the Texas Department of MHMR. I was recently re-appointed by Governor Perry to the Board of Directors for the Interagency Council on Autism and Pervasive Developmental Disorders.

I have reviewed materials sent to me from George McCall Secrest's office, information reflecting academic, behavioral, and professional records for Bobby James Moore. My review included an evaluation of various reports and records from the Juvenile Probation Department, Texas Department of Criminal Justice, and court transcripts. I reviewed various court filings, motions and responses, along with reports from medical, psychological, and educational resources. My evaluation also included review of assorted interviews with family members and friends.

I conducted this review in an attempt to determine whether there was sufficient evidence to support a motion for a hearing to determine whether or not Mr. Moore might meet the criteria for mental retardation as defined by current psychological theory. It is my professional opinion that there are sufficient indicators to suggest that Mr. Moore suffered from mental retardation during the developmental period and into his adulthood, and should be allowed the opportunity to submit such a motion to the court.

School records consistently reflect an inability for Mr. Moore to succeed in the academic setting from his first experience in Kindergarten. At age 5, his kindergarten teachers were expressing concern of possible mental retardation. After being retained in the first grade due to poor grades, he was socially promoted or "promoted on age" every year thereafter until be dropped out of school in the ninth grade.

Each year, grades were consistently D's and F's, with occasional C's.

Grade Equivalents were also reflective of Mr. Moore problems. A Grade Equivalent is a measurement used in education to reflect a student's accomplishments. The Grade Equivalent numerically reflects the grade level that the student's achievements fall within. Mr. Moore consistently through the years was shown to be 2 to 3 grades behind his then grade level. He would be shown farther behind if one were to compare his Grade Equivalent scores to the grade he chronologically should have been in.

In addition to the low grade equivalent scores and his poor grades, Mr. Moore's performance on the Iowa Test of Basic Skills (ITBS) consistently reflected problems in basic skills, In Grade 3, when by age criterion he should have been in grade 4, he scored at the 2.6 grade level on the ITBS. He had a chronological age at that time of ten years, six months, and was in classes with 8 and 9 year old children. In Grade 4, he scored at the 3.0 grade level. In grade 6, at a chronological age of 12, he scored at the 4.4 grade level. It was evident that each year he fell further behind, while making largely D's and F's along with social promotions.

His academic records reflect a number of IQ scores. At age 12, when his reading skills and abilities were shown to be at the second percentile (less than ninety eight out of a hundred), he obtained an IQ score of 77 on the Otis Lennon Mental Abilities Test. This is a group paper-and-pencil tests of general mental abilities which requires one to read the test and answer the questions. Due to the ongoing evidence of his inability to read, this score is questionable as to its validity. Other test scores reflected in the records during his

sixth grade year, the last year he passed any classes at all in public school, were as follows:

Slosson IQ 57

WISC IQ 78

Bender IQ 67

Goodenough IQ 72

In a Houston ISD Psychological Evaluation report dated January 24, 1973, when Mr. Moore was 13 years, 3 months, several observations and recommendation were made. One observation was that Mr. Moore "does not seem to realize that subtraction is the reverse of addition". The report noted that Mr. Moore "could work on this level (second grade) if he has enough pre-vocabulary work". It went on to note that Mr. Moore "needs regular language development".

The recommendation in the Houston ISD report suggested that they needed to "daily drill (overteach) such things as days of the week, months of the year, seasons, standards of measure, telling time, etc. What comes before Monday? What comes after?" It seems clearly apparent that at age 13, these simple basic concepts and skills that one usually learns not only in school but in day to day living were not in evidence or were significantly deficient.

It is clear that the preponderance of the indicators, particularly when combined with Mr. Moore's academic record, indicates substantive limitations in learning and progressing during the developmental period. Those indicator also clearly establish a pattern of significant deficits in intellectual development.

Review and evaluation of records from TDCJ further underscore deficits in Mr. Moore's intellectual and mental processes. Two recorded IQ scores, one from

a brief version of the Wechsler and the other from a full Wechsler test administration, were 71 and 74 respectively. A psychologist noted in 1989 that "he may need services for mental retarded (sic)". Another psychologist's note said that "his responses were appropriate to his 9th grade educational level and indicated IQ of 71."

In addition to having these various reported IQ scores supporting a diagnosis of Mental Retardation, Mr. Moore has exhibited significant limitations in adaptive behavior in several areas of his life for as long as records have been retrieved. There are sufficient historical references to his inability to live effectively in society and to manifest a variety of conceptual and practical skills. From both the perspective of the American Association on Mental Retardation and the American Psychiatric Association, Mr. Moore meets or exceeds threshold diagnostic criteria in the area of adaptive behavior deficit.

Interviews and anecdotal reports from family and friends consistently paint a picture of intellectual and academic challenges in an environment of extensive and pervasive physical and psychological abuse. Comments such as the following underscore Mr. Moore's deficits.

> "It was hard to participate because he couldn't comprehend."
>
> "If a teacher asked him to "try" to read out loud, the children would laugh."
>
> "He got teased for being "dumb" and punished by his father who called him "stupid".
>
> At age 13, records indicate that "he needs special placement".

"Bobby did not like school and felt like he didn't belong."

"He felt different from the rest."

He "realized that he didn't have the ability to learn and felt frustrated in school".

He "felt embarrassed because he couldn't read or write".

Reflections and anecdotal remembrances were consistent and similar. Further, the memories of the environment were the same: abusive and unhealthy influences. The significance of the environmental issues are found when one considers the etiological factors that can lead to Mental Retardation. When Mental Retardation is being considered, it is important to look at possible causative factors which become a part of the overall assessment. They become validations and confirmations for the diagnosis. In Mr. Moore's case, indications of etiological causation is extensive. The following will outline the risk factors typically considered in looking for causation, understanding that the more extensive and/or signficant the factors are in a person's life, the more confirmational they become of the diagnosis.

BIOMEDICAL

Prematurity, Neonatal Disorder, Traumatic Brain Injury, Exposure to Chemicals

SOCIAL

Poverty, Maternal Malnutrition, Domestic Violence, Impaired Child CareGiving, Lack of Adequate Stimulation, Family Poverty, Chronic Illness in the Family

BEHAVIORAL

Parental Alcohol Abuse, Parental Rejection of Care Taking, Parental Immaturity, Abandonment and Rejection, Child Abuse and Neglect, Domestic Violence, Inadequate Safety Measures, Social Deprivation

EDUCATIONAL

Lack of Preparation of Parents for Parenthood, Impaired Parenting, Inadequate Early Child Care, Inadequate Special Education Services, Inadequate Family Support

OTHER

Exposure to Chemicals and Environmental Toxins, Substance Abuse, Negative Social and Peer Group Influence, Malnutrition

It is stunning how many of these etiological factors were present in Mr. Moore's life, from birth into incarceration. If there were, as some have suggested, comorbid conditions such as learning disabilities or mental illness, then the confirmational power of these factors is overwhelming.

From the stand point of the Diagnostic and Statistical Manual of the American Psychiatric Association — Fourth Addition (DSM-IV), Mr. Moore has historically manifested deficits in "adaptive skill areas" such as social and interpersonal skills, use of community resources, self-direction, and work. The requirement for a diagnosis of Mental Retardation in the DSM-IV requires significant deficits in only two of eleven adaptive behavior areas. Mr. Moore has exceeded that threshold, concurrent with a variety of IQ scores within the range of diagnosis, over virtually his entire life.

From the stand point of the American Association on Mental Retardation, 10th Edition 2002 Manual, Mr. Moore has historically manifested deficits in the "Social Adaptive Skill Area" in general, and in specific areas of both the Conceptual and Practical realms. The requirements of the AAMR Manual require significant deficits in one of the three major areas of adaptive skills. For Mr. Moore, this has primarily been in the Social Adaptive Behavior Skill Area, which includes problems in areas such as interpersonal, responsibility, naiveté, follows rules, and obeys laws. Specific deficits have also been historically recorded in self-direction, occupational skills, use of community, and maintaining a safe environment. It could be argued that he has also manifested deficits in functional academics and health & safety. This pervasive pattern of deficit clearly exceeds criteria.

As a result of this assessment of the material submitted for review, it is my professional opinion that there is sufficient evidence to suggest that Mr. Moore has mental retardation, and should be allowed the opportunity for a full hearing in that regard before the court.

/s/ Richard E Garnett
Richard E Garnett, Ph.D.

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Richard E. Garnett, on this the 16th day of June, 2003, to certify which witness my hand and seal of office.

My commission expires 5/27/05

/s/ Katrina Peacock
Notary in and for the State of Texas

REPORTER'S RECORD
VOLUME 29 OF ___ VOLUME(S)
TRIAL COURT CAUSE NO. 314483

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
185TH JUDICIAL DISTRICT

BOBBY JAMES MOORE,

Appellee

v.

THE STATE OF TEXAS,

Appellant.

PUNISHMENT PROCEEDINGS

On the 12th day of February, 2001, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Larry Fuller, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

* * *

[6] BETTINA WRIGHT
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. (BY MR. MORROW) Please state your name for the jury.

A. My name is Bettina Wright.

Q. How are you employed, Ms. Wright?

A. I am a clinical social worker in private practice.

Q. Can you tell us about your educational background?

A. I have a Bachelor's Degree in psychology from the University of St. Thomas here in Houston and a Master's Degree in social work from the University of Texas at Austin.

[7] Q. Tell us about your private practice. What do you do in that practice?

A. I have been in private practice for about five years. It's a solo practice. I see a variety of clients from teenagers well into adulthood and people into their sixties and seventies. It's a very varied practice. I have an extensive background in the area of chemical dependency and addiction. I deal with childhood trauma, child abuse, recovering from sexual abuse.

Q. At my request, did you have an opportunity to look at some records about Bobby Moore?

A. Yes, sir.

Q. And also to meet with Mr. Moore?

A. Yes, sir. I met with Mr. Moore twice.

Q. Let me ask you, Ms. Wright, we're talking about someone's childhood, what are the three basic—what are the basic—what are the things that someone needs to grow up healthy and well?

A. Well, according to basic psychological theory, there are three areas that are important in the development of any child biologically, ego and environment.

Q. When you talk about biological what does that address?

[8] A. Basic biological needs being met, whether they're fed, clothed, housed, and what kind of physical limitations they might have, health of course.

Q. Ego, what does that refer to?

A. Well, that's socialization, how we live in the world, how we think, our ability to think. Education plays a part in that, what we learn.

Q. And what was the last area you mentioned?

A. Environment or experience. Which plays an important role in what I believe about myself, how I grow up, what I see, what—how I view the world. Because a child's experience is what they experience. They don't have any frame of reference to see that differently or that there are different ways of—that people live.

Q. And looking at the records and speaking with Mr. Moore, do you have an opinion as to how he fairs in each of these three areas? Let's talk about the biological one first.

A. Well, biologically, I think he was—my opinion is, nonmedically, he was born with everything he needed. He was born basically healthy and didn't have any physical limitations. Whether he was well fed and kept safe is, you know, a matter of opinion, but I think biologically he basically has everything he [9] needs.

Q. So to tilt the biological area against someone you have to talk about some sort of birth defect or physical deformity; is that correct?

A. Or extreme poverty severe neglect, malnutrition, that sort of thing can affect.

Q. To an extreme level;—

A. Yes.

Q. —is that correct?

A. Yes.

Q. Now, the second area was ego. What did you find in your work there?

A. Well, I think the educational system did Bobby a grave disservice. He was socially promoted through school. My opinion is he probably had suffered from some learning disabilities that were never diagnosed as a child, and he didn't learn. He didn't progress in school. The records actually say social promotion took place consistently. He didn't learn how to write his name until he was in the fifth grade and he was isolated in classes. He understood that to be because the teachers were trying to protect him, but the result was he didn't learn anything. He was diagnosed as retarded.

Q. How can that affect a child's perception and [10] his ability to cope in later life?

A. Well, Bobby, I don't believe, really had any sense of himself. There was no sense of self-esteem. There was no—he didn't learn it. He was okay. He saw himself as different, incompetent. The more children learned around him the more deficient he saw himself as because he was not learning and keeping up.

Q. Are those the primary findings you made on the ego aspect or are there others?

A. Really, the biggest deficit he had in that area is education.

Q. How about the environment or experience?

A. His environment was extremely dangerous in his childhood. When I asked him how to—give me a couple of words to describe your childhood he said

scary. His father was violent, violent with the children, and violent with his mother. And safety is probably the most important things that you can provide for a child. His family was disjointed. A couple of his brothers were raised by someone else. As they got older the mother distributed the children around among different people. Which I understand she needed to do. But he didn't know where his family was. His mother was out of the house working most of the time. His father was drinking and violent and neglective. [11] There was no sense of safety in terms of where he was or who he was or how he was.

Q. Now, what is—how does this lack of safety translate into either later behavior or behavior even as a child or young person?

A. Well, we will seek safety first. It's more important than love. It doesn't matter whether I'm loved if I'm not safe. And I—the way he described it, I saw his childhood as pretty terrifying. A child is completely dependent on their environment and completely vulnerable so he had nowhere to go. He described a sister who really was the person who brought him up. And her availability was, of course, limited. She was a child herself.

Q. Is there any relationship between the lack of safety and the other two we talked about, the ability to do well in school and perception of himself.

A. There was some mention in some of the school records about he was very quiet, he was—he didn't make—he didn't move around much, he was very limited in his motions. And what I understood in the records was they were attributing that to his retardation. I believe that was attributable to his fear. He didn't—he was very vigilant and he was always

watching. He wasn't going to do anything until he assessed the [12] situation and found a way to deal with it. That's not uncommon in a child that's not safe and neglected.

Q. Ms. Wright, let me ask you if—you know, you weren't there when Bobby Moore was growing up, you didn't observe these things for yourself.

A. No.

Q. Are you kind of dependent on what he tells you? I mean he tells you a story. How do you deal with that when trying to make an evaluation?

A. How do I deal with?

Q. What do you know what really happened? How do you know if it's true, for example, whether he's just trying to sell you a line, you know, he wants you to say something good about him?

A. That's a pretty subjective process. I have to base that on my experience of having worked with hundreds up until, you know, over a thousand people to be able to determine whether what I'm hearing is truth and I have to base that on how they describe what they described.

Q. Do the records help you at all to kind of give an answer to that?

A. Of course.

Q. The records gave me a benchmark to validate what he said and his demeanor ties in with the [13] description of him in his school years.

A. It makes a lot of sense to me.

Q. Okay.

Was there any sign or discussion about drug use and how that might have played apart in his development?

A. I discussed with him his drug use and I feel like he gave me an accurate description. His exposure to drugs began in about the fifth grade. And the purpose for which I think he used drugs was to escape the pain. Those were his words. He said it was one way to escape the pain. He began with marijuana use, which is not uncommon in those younger years. Seeing that passed around he used—can I refer—

Q. Sure.

A. —to my note?

In what would be considered his junior high and high school years he used marijuana, alcohol amphetamines, tranquilizers. And as I said, his quota was that was a way to escape the pain. I think he just used whatever drugs were available to him.

Q. Was that something that's unusual in your experience dealing with people that come from homes of this type?

A. Absolutely not. A child will seek anything [14] that will alleviate the pain that they are in and the terror.

Q. In talking about his—you used the word psychosocial, I think, development. What does that mean?

A. Well, psychosocial development is a very—again, a very common psychological term that—theory that talks about the process that we go through growing up, the developmental task, as they are called, that a child needs to complete in order to move on to the next stage.

Q. What are some of those stages that people go through?

A. Well, they're described in terms of the task that is accomplished or not accomplished, and the earliest one is called trust versus mistrust.

Q. So you tie this to a particular age of development?

A. Yes. According to the theory, there's a general age. Birth to age two a child develops either trust or mistrust. Age two to four a child develops either shame or autonomy. Age four to six, guilt or initiative. Age six to 12, inferiority or industry. Age 12 to 18, which represents young adolescence, alienation or identity. And age 18 to 22 identity [15] confusion over individual identity. And the stages go on all the way through life, but these are the ones I addressed in the terms of Bobby because it was during that last phase that he went to prison.

Q. See you found someone who had obviously difficulties in each of these areas. So does that mean that they're not responsible for what they do; is that what you're telling me?

A. No, of course not. That's not the point. But he is—suffers from a deficit in social development, psychosocial development.

My experience with Bobby was unusual and the story I got from Bobby was unusual because it is my opinion that he did not accomplish any of those tasks in his childhood, and that's very unusual. It's very common for all of us to have not completed one or two or several of these. The less functional I find a person to be in their adulthood the more likely it is that they struggled with these tasks.

Q. What do they do, though, when you get to adulthood and you haven't resolved some of these issues or developed a skill in doing the tasks; what happens to you then?

A. It is possible to go back and relearn. It's always possible.

[16] Q. What's the key component in that ability to do all these other things?

A. I'm sorry.

Q. The key component. What do you have to have before you can do any of these other—development psychologically. What are the things you told us children seek out first?

A. Safety.

Q. Now, you know Mr. Moore has been convicted of criminal offenses and you've seen some of those starting very young. Can you tell us about that?

A. Well, my understanding of the situation, he was thrown out of his home by his father at the age of 15 after an event in which he was trying to prevent his father from hitting his mother. He intervened in a fight where his mother was being abused and told his father not to hit his mother, and his father turned on him and threw him out of the house. He was 15, was not going to school, and he went to stay with a friend and the father contacted the mother of this friend and told the mother that Bobby was no good and that he was dangerous to have in her home so she threw him out.

Q. Where did he go at that point?

A. He spent some time sleeping on the street, I understand.

[17] MS. PARSONS: Your Honor, I object to all the hearsay unless she can identify where—what are we talking about.

MR. MORROW: I'd be happy to clarify that, Your Honor.

Q. (BY MR. MORROW) Ms. Wright, now, he is out on the street and put out of another house. What happens from your study at that point, roughly?

A. What happened to him? What is his story?

MS. PARSONS: Well, Judge, I again object to the hearsay.

MR. MORROW: Judge, she's an expert testifying about his development and allowed to rely on that information to give the jury the basis for opinion.

MS. PARSONS: What information are we talking about, Judge? Now she's talking about what a father said to a neighbor who was—I mean, there is no source of this information, Judge.

MR. MORROW: I'll be happy to clarify that, Your Honor.

Q. (BY MR. MORROW) Ms. Wright, your testimony here today is based on what, interview, review of records; is that right?

A. A review of records and my interview with [18] Bobby Moore.

Q. Okay.

Now, without telling us what somebody else said, what happened next in his developmental process?

A. You were asking about the criminal behavior.

Q. Yes. What happened? How did that come about, in your opinion?

A. In my opinion, he got involved in criminal behavior with his friends and my belief is that that is based on the fact that that was the only social network that he had. That was basically his family and his desire to participate with that social network, to be involved with someone, to have a sense of belonging somewhere.

Q. So does that excuse his conduct, then, that he went out and committed a crime because he felt it was the only family that he had? Does that make it okay?

A. No, it doesn't make it okay. I—from a child's perspective, it's important to realize that a child does not think like an adult. Even at 15, 16, 17, we do not have—an adolescent does not have the complex thinking skills that an adult has. He certainly made poor choices. I don't argue that, and I don't argue the crimes that took place.

[19] Q. And he still bears responsibility for those choices, doesn't he?

A. Yes, sir, he does.

Q. You're not telling us that he is insane or incompetent?

A. No, I am not. I don't think he is either.

Q. Now, this is a—I wonder if this is an unusual situation for you, to talk to somebody who has been in prison for 20 calender years?

A. Yes. I haven't done that often.

Q. Tell me what you learned about that? What did that incarceration mean to him? What did he learn?

A. Most significantly what he learned during his incarceration was how to read and write. And my—the way he explained it to me, his fellow member of death row started giving him some words and teaching him some words and what they meant and—

Q. Did you find that to be significant in your review of the facts and your opinion of him?

A. That relates to what I said a moment ago about we can always go back and learn. And that's what he did. He learned to read and write and from the ability to read and write he gained a lot of information.

Q. Who was the—how did he learn other than from the other prisoners? Were there other people [20] involved as far you know at this point?

A. In the beginning he had—he said that he had a dictionary and a Bible and he looked up words and found letters and began to find those, the significance of those words, and he had a lot of time on his hands and he could repeat those words to himself and memorize what they meant and begin to develop a vocabulary.

Q. Were there other relationships that you're aware of that also helped him through this process, learning to read and write? Was there a person that wrote him letters, people that he corresponded with?

A. He learned how to—he started putting together words so that he could write letters. And he had other inmates that helped him learn particular words and who wrote letters for him and would read the letters he received to him. And he very slowly and progressively began to learn to read, and that opened up a whole world to him.

Q. How do you mean it opened up a whole world to him?

A. He began to understand things that he had no concept of before, which was part of the problem with the educational process. As people learn it's not just words, it's understanding the world and how it functions. And he began to read books, he began to [21] interact with people.

Q. Do you have any particular illustration that you found significant, that were helpful to him?

A. Around 1990—yeah, 1990, he began to correspond with someone through an organization called Lifeline I believe it was. Yes.

Q. Why was that significant?

A. He described he began corresponding with a woman, an older woman who has since died. And his words were I learn the importance of being open and honest, she really added to my growth and development. Which I thought were interesting words for him to choose. He began to see himself as human and participate in relationships with other people.

* * *

[25] Q. Well, would it surprise you that the actual Wechsler intelligence scales for children put his verbal IQ at 77, his performance scale IQ at 83 and his full scale at 78?

A. No, it wouldn't surprise me.

Q. That is not mentally retarded?

A. Yes, ma'am. I agree.

Q. All right.

A. I do not believe that he is mentally retarded myself. He was—what I said was the schools diagnosed him as mentally retarded and he got put aside and kept out of the regular mainstream of the learning process. I do not believe that he is mentally retarded. I believe it is his lack of education. And when he was tested later in the criminal justice system it was—it came out higher.

Q. That's right, it came out higher?

A. Yes, ma'am.

Q. He's not—I mean, from those test scores and educational records and later on when he's tested later in his life he is nowhere near mentally retarded.

A. I agree.

Q. Okay.

A. I agree with that completely. I do not see him as mentally retarded. My point was that he was [26] pushed aside and seen as mentally retarded as a child.

Q. All right. That's the opinion that you have gathered; isn't that right? But nowhere in the school records does it reflect that he was diagnosed as being mentally retarded, does it?

A. I can't find that, no.

* * *

[42] Q. Ms. Wright, you weren't trying to tell the jury that it's your opinion that Mr. Moore is retarded, are you?

A. No, sir.

Q. And in fact, what is your opinion about his ability to learn on his level of functioning?

[43] A. I think he probably has an average IQ and his ability to learn is very intact.

* * *